TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 962.

THE NORFOLK AND SUBURBAN TURNPIKE COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED FEBRUARY 2, 1912.

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INDEX.

	Original	Print
Petition for writ of error	1	1
Record from circuit court of Princess Anne county, Virginia	34	20
Order of April 21, 1911, appointing viewers	34	20
Certified copy of order appointing viewers	35	21
Report of viewers	36	21
Appeal from report	38	23
Order of December 12, 1911, confirming report, &c.	38	23
Order for stay	39	24
Order allowing bills of exceptions	39	24
Bill of exceptions No. 1	41	24
Motion to dismiss (No. 1)	41	24
Judge's certificate	42	25
Bill of exceptions No. 2	43	25
Motion to enter no judgment, &c. (No. 2)	43	25
Judge's certificate	44	26
Bill of exceptions No. 3	45	26
Motion to hear evidence, &c. (No. 3)	45	26
Judge's certificate	49	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 28, 1912.

	Original	Print
Bill of exceptions No. 4	50	29
Motion to dismiss (No. 4)	50	29
Judge's certificate	51	29
Bill of exceptions No. 5	52	30
Motion to refuse to confirm (No. 5)	52	30
Judge's certificate	53	30
Bill of exceptions No. 6	54	31
Motion to quash report (No. 6)	54	31
Judge's certificate	56	32
Bill of exceptions No. 7	57	32
Offer of W. R. Butcher's evidence	57	32
Judge's certificate	57	32
Clerk's certificate to record	58	33
Order refusing writ of error	59	33
Certificate of clerk	60	34
Certificate of president judge	60	34
Certificate of clerk	60	34
Assignment of errors	61	34
Petition for writ of error	64	36
Order allowing writ of error	64	36
Writ of error	66	36
Bond on writ of error	68	38
Citation and service	70	39

1 To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Norfolk & Suburban Turnpike Company, a corporation duly chartered under the laws of the State of Virginia, respectfully represents unto your Honors that it is aggrieved by a final judgment and order of the Circuit Court of Princess Anne County, Virginia, entered in certain proceedings pending in said Court, whereby the collection of tolls by your petitioner on certain sections of certain turnpikes, located in Princess Anne County, Virginia, and belonging to your petitioner, was suspended, and travel and passage over said sections of said turnpike made free to the public.

A somewhat detailed statement of the facts of said proceedings, as shown by the transcript of the record therein herewith filed, is necessary to a correct understanding and appreciation of the questions involved therein, and now presented by your petitioner for consideration.

Statement of Facts.

The proceedings originated under chapter X of "An act concerning Public Service Corporations" to be found in Acts of Assembly of Virginia, 1902-03-04 at P. 968, and amendments of said Act. The provisions thereof, so far as pertinent here, will also appear from clauses (5), (6), (7), (8), (9), and (10) of section 1294-J of Pollard's Code of Virginia, and subsequent amendment of clause (9) thereof will appear from Volume 3, Pollard's Code of Virginia,—Supplement of 1910 to said Code,—at the bottom page 193, and amendment of clause (10) will be found in Volume 3, of Pollard's Code of Virginia, at the bottom page 194.

By said statutes and amendments thereto it is, among other matters, provided that the Circuit Court, or Judge thereof in vacation, of

2 each county in Virginia, wherein there is a turnpike road shall, in the months of April, August and December of each year, appoint three free-holders, not living on said road as "viewers for each of said turnpike roads in his county" who shall, at a time to be specified in the order, examine the same and each section thereof.—Volume 1 Pollard's Code of Virginia, Section 1294-J clause (5).

Said freeholders so appointed are to meet as provided by the order, take an oath to faithfully perform their duty and make a report of the conditions of the section to the Court, said report to be in the form provided by the statute.—Volume 1, Pollard's Code of Virginia, Section 1294*j*, clauses (6) and (7).

Said report is to be returned to the Clerk's office of the court to be preserved and recorded, and provision is made as to who shall pay the fees therefor.—Volume 1, Pollard's Code of Virginia, Section 1294*j*, clause (8).

It is further provided that if any section or sections of the turnpike road so examined is pronounced by the report to be out of

repair, tolls thereon shall be suspended from the time said report is filed in the Clerk's Office, unless an appeal be taken from the said report to the Circuit Court, and if the report is confirmed on such appeal, then the tolls shall be suspended from the date of the judgment or order of confirmation. Upon the hearing of any such appeal from said report the court is authorized to confirm, set aside, or re-commit the said report, or enter such order in the proceedings as it may deem advisable. If the tolls are suspended, they are to stand suspended until the road, or section affected, is put in good repair, to be ascertained on application of the owner of the turnpike to a magistrate, who shall issue warrants to three freeholders to meet on the road, or sections, and ascertain whether the same is in good repair, and the subsequent proceedings on this last report are the same as on the original report.

3 It should also be carefully noted here that by said Act the rates which can be charged by an owner of a turnpike for the travel and passage of persons and things over its turnpike is fixed and limited at so much for each section of said turnpike roads, or parts of sections thereof, and penalties are provided for violation of this section.—Volume 3, Pollard's Code of Virginia, at bottom page 194, section 1294*j* (10).

Your petitioner owns, among other roads, three turnpike roads, spoken of in the record filed herewith, as Indian River Turnpike Road, Broad Creek Turnpike Road, and Norfolk and Princess Anne Turnpike Road, and certain sections or portions of these last named roads lie in Princess Anne County. While all of said roads belong to petitioner, yet they are entirely distinct and separate roads, the one from the other, and traverse different sections of Princess Anne County aforesaid.

Proceeding under the statute aforesaid, the Judge of the Circuit Court of Princess Anne County, on the 21st day of April, 1911, entered an order in vacation, appointing Thomas Edmunds, C. F. Hodgman and W. B. Frizzell as freeholders to examine and view those sections of the turnpike roads aforementioned in Princess Anne County, and specified by said order that said freeholders should meet on the 27th day of April, 1911, and inspect and view said sections of said turnpike roads in Princess Anne County, and make report thereof to the court.

It will be noted from the record that no separate order was made to the respective sections of the several turnpike roads aforesaid, located in Princess Anne County, nor were different freeholders appointed for the different respective turnpike roads, or sections thereof, in said county; the order was a single order, embracing all the roads within the jurisdiction of the court, and named the same three persons as viewers of all of said roads. No notice was given

4 petitioner of said order, either before or after the time of its entry.

The persons named in the order filed a report in the Clerk's Office of Princess Anne County on the 8th day of May, 1911, in which, in substance, they reported that all the turnpike roads owned by your petitioner, and located in Princess Anne County, and each

section of said turnpike road located in said county, were not in good repair, and recommended that the tolls be suspended thereon.

From such report so filed, your petitioner, in accordance with the statute, appealed to the Circuit Court of Princess Anne County, in which court said appeal came on to be heard on the 12th day of December, 1911, and it was on the hearing of said appeal that the said petitioner made its first appearance, and had its first opportunity to make any objections to said proceedings whatsoever, except that it had noted its appeal from said report as a necessary and p-erequisite step to procure any hearing by it thereon before the Court.

When such appeal was called for hearing in said Circuit Court, your petitioner made several motions in writing relative thereto, as follows:

Motion No. 1.

By Motion No. 1, as will appear from the bill of exceptions No. 1 of the record P. 9, petitioner moved that the whole of these proceedings be dismissed in toto on the ground that the statute under which they were being prosecuted and pended was and is unconstitutional and invalid: because,

(*a*) Jurisdiction of such matters as are embodied in said proceedings, and the jurisdiction to make such orders as are contemplated by said proceedings authorized by said statute, is exclusively in the State Corporation Commission of Virginia, under Section 156*a* of the Constitution of Virginia, and the Legislature of Virginia could not confer on the Circuit Court of Princess Anne County jurisdiction of such proceedings, or jurisdiction to enter any such judgment as was authorized by said act; because,

(*b*) Said statute authorized the Court to enter a judgment by which, if the report of the viewers in said proceedings was confirmed, travel and passage by the public over the sections of the turnpike roads involved therein would be made free and without toll or any other compensation to your petitioner, and, therefore, said act authorized the taking of the property of your petitioner for public use, without making any compensation therefor, in violation of Section 1 of Article XIV of the Constitution of the United States providing that no State shall "deprive any person of life, liberty or property without due process of law," and that portion of Section 11 of Article I of the Constitution of Virginia providing "that no person shall be deprived of his property without due process of law;" because,

(*c*) Said statute violated those portions of the Constitutions of the United States and of the State of Virginia hereinabove last mentioned.

Said Circuit Court of Princess Anne County promptly overruled said motion, and thereupon your petitioner, without waiving the same, made its

Motion No. 2.

By Motion No. 2, as will appear from bill of exception No. 2 in the transcript of the record, P. 12, petitioner moved the Court that it enter no judgment in such proceedings confirming the report of

the viewers of the road in such proceedings mentioned, because by any such judgment travel and passage by the public over each and every section of the turnpike roads therein involved would thereby be made free and without any compensation to your petitioner, and that such judgment would operate and have the effect of depriving your petitioner of its property without due process of law, in violation of those portions of the Constitution of the United States and the Constitution of Virginia, herein above mentioned.

The Circuit Court of Princess Anne County promptly overruled this last motion of petitioner, and thereupon petitioner, without waiving its rights under its preceding motions, made its

Motion No. 3.

This motion, as will appear from bill of exception No. 3
6 in the transcript of the record, Page 14, was made in writing, and a correct understanding of the same is of the utmost importance in the consideration of the questions presented by this petition.

By this motion No. 3 your petitioner represented to the Court that it was the owner of the turnpike roads and sections thereof, relative to which the report of the viewers appointed in such proceedings was filed in the Clerks' Office on the 8th day of May, 1911, and from which said petitioner had appealed to the Circuit Court; that petitioner had purchased said property and gone into the possession of the same on the first day of July, 1908, and had operated the same continuously from said date, and at no time since said date had any viewers appointed under the law of Virginia reported said sections of said turnpike roads, or said turnpike roads mentioned in said report, as not in good repair, but had reported to the contrary; that by the statute under which said proceedings were being prosecuted and were then pending in said Circuit Court, the tolls which your petitioner could and can charge for travel and passage of persons and things over said sections of said turnpike roads, and said turnpike roads in said report mentioned were fixed and limited, and provision made thereby for a fine for the violation of the said statute by the collection of tolls in excess of the amount fixed and limited thereby; that your petitioner had in the collection of tolls for such travel and passage over its turnpike roads, and especially over the turnpike roads and sections thereof mentioned in said report, conformed at all times to the tolls fixed and limited by said statute; that petitioner, during the ownership of said turnpike roads and sections thereof, mentioned in said report, had expended in the
operation and maintenance of the same, all the tolls and
7 moneys ever received by it therefrom, directly or indirectly, with the exception of a small amount of money representing the proportion of yearly interest which said sections of said turnpike roads and said turnpike roads equitably had to bear of the yearly interest on a mortgage covering the said turnpike roads, and other turnpike roads belonging to your petitioner, which said proportion of yearly interest, borne by said turnpike roads and sections thereof involved in these proceedings, was very small and the amount

did not equal interest at one-half percent. per annum on the real value of said turnpike roads and sections thereof, or on the original purchase price paid therefor by your petitioner; that the expenditures that your petitioner had made, as aforesaid, in the operation and maintenance of said turnpike roads, and sections thereof, mentioned in said report, had been properly and judiciously made, and said expenditures had been in a reasonable and unextravagant manner, and not in a wasteful or injudicious way; that since the 1st day of March, 1911, petitioner had, in the operation and maintenance of said turnpike roads, and sections thereof, mentioned in said report, expended an amount of money much in excess of what it had received in any way, directly or indirectly, therefrom, and the said amount so expended by it had been expended judiciously and unextravagantly and properly, and that since said 1st of March, 1911, said turnpike roads and sections thereof involved in this proceeding had paid nothing towards interest on the mortgage by which it was covered, as hereinabove set out, although the interest on said mortgage had become payable since said date; that said turnpike roads, and sections thereof, involved in said proceedings, were kept and maintained in as good repair as possible with the revenue received therefrom, which revenue was and is limited, because of the fact that the tolls charged for passage of all classes of persons and things over same were fixed by the statute above-mentioned,
8 and by reason of such statute petitioner could obtain no additional revenue from said turnpike roads, or sections thereof, by an increase in the tolls thereon; that although said turnpike roads and sections thereof involved in these proceedings, were of large value, and were purchased by the petitioner on the 1st day of March, 1908, at a reasonable price, yet the petitioner had never derived therefrom any income or any return on the purchase price paid therefor, or on the value thereof, but the same had proved, by reason of the limitation of the toll charges thereon by said statute, and the expenditures made in maintaining and operating the same, a losing investment to your petitioner; that any judgment rendered by said court in such proceedings, in view of the facts above set forth, or without considering said matters and hearing evidence relative thereto, and by which any such judgment, the collection of tolls on the turnpike roads or sections thereof, mentioned in these proceedings, would be suspended, would not only be unjust and inequitable, but would violate that portion of Section 1 of Article XIV of the Constitution of the United States, providing that no state shall "deprive any person of life, liberty or property without due process of law," and that portion of Section 11 of Article I of the Constitution of Virginia providing that "no person shall be deprived of property without due process of law," in that any such judgment would deprive petitioner of its property without due process of law; and that additional expenditures on said turnpike roads and sections thereof, involved in these proceedings, would not increase the passage and travel over the same, and the revenue derived therefrom would not be in any wise increased from that now derived therefrom.

And said petitioner, after alleging the facts above set forth, moved the said Circuit Court,

9 (*a*) That it be allowed to produce evidence before said Circuit Court to substantiate and prove the matters and facts hereinabove stated, and that said Circuit Court should hear and consider said evidence;

(*b*) That after hearing and considering the same, said Circuit Court should refuse to confirm the report of the viewers therein, and dismiss said proceedings;

(*c*) That should said Circuit Court refuse to hear and consider said evidence, said Circuit Court should enter no judgment herein, by which tolls would be suspended on the turnpike roads, or sections thereof, involved in the proceedings, or any other judgment than a judgment refusing to consider said report of said viewers.

The Court, however, promptly overruled such motion, in every respect, refused to allow the production of evidence to substantiate and prove the matters and representations contained in such motion, and refused to hear or consider the same in any way.

And, thereupon said petitioner, without waiving its preceding motions, made its

Motion No. 4.

By this motion, petitioner, as will appear from bill of exceptions No 4, in the transcript of the record, p. 19, moved said Circuit Court to dismiss the proceedings mentioned, as illegal and invalid, because the statute, under which they were being prosecuted, was too vague and indefinite to be enforced, in that, it fixed no standard by which the viewers appointed thereunder, or the Circuit Court in acting thereunder, could determine whether said roads were out of repair, in good repair, or in insufficient repair, and left entirely to the discretion of said viewers to be determined by them only from

10 an inspection of the turnpike roads and sections thereof, involved herein, whether, in their opinion, said turnpike roads and sections thereof were out of repair, not in good repair, or in insufficient repair, and left petitioner and its rights entirely to the discretion of said viewers in making their report, and to the Circuit Court in acting thereon without any rules or standard by which said viewers or said court was to be guided.

This motion the said Circuit Court promptly overruled, and the petitioner, without waiving its preceding motions, made its

Motion No. 5.

By this motion as will appear from bill of exceptions No. 5 in the transcript of the record, p. 21, petitioner represented to the Circuit Court that the report of the viewers had been filed in the Clerk's Office on the 8th day of May, 1911, and that since said date petitioner had expended a large sum of money, to-wit: $1846.77, in repairing the turnpike road, known as Indian River Turnpike Road, and the sections thereof, involved in these proceedings, and $1517.76 in repairing Broad Creek Turnpike Road and sections thereof, in-

volved in these proceedings, and $1484.65 in repairing the Norfolk and Princess Anne Turnpike Road, and sections thereof, involved in these proceedings, and the said report of the viewers could not, therefore, truthfully represent the present condition of said turnpike roads, or sections thereof, or any recent condition of the same, and the said petitioner moved the said Circuit Court for these reasons that it should not confirm the report of said viewers, but that it should refuse to confirm the same, and either dismiss these proceedings or re-commit said report, as provided by statute.

Said Circuit Court, however, promptly over-ruled said motion, and the petitioner, without waiving any of its preceding motions, made its

11 Motion No. 6.

By this motion, the petitioner moved the said Circuit Court to quash said report of said viewers, on the ground that the viewers making the same were disqualified to act, under the statute, because of their interest in the matter, and because they lived on one or the other of said turnpike roads, or sections thereof, involved in said proceedings, and because they used the same regularly in their business. To support this motion, petitioner first introduced the witness Thomas Edmunds, who was one of the viewers making the report aforesaid, and said Thomas Edmunds testified that he did not live on any of said turnpike roads, yet he lived about three or four hundred yards from the Broad Creek Turnpike Road, and used it and traveled over the same. Said Edmunds was then asked if he used the turnpike road regularly, to which question objection was made, and the Court sustained said objection, and would not allow the same to be asked or answered, to which action of the Court the petitioner duly excepted.

Petitioner thereupon introduced, as a witness, C. F. Hodgman, another one of said viewers making said report, involved herein. Mr. Hodgman testified that he lived in Princess Anne County near Diamond Springs; that Diamond Springs proper was not on any turnpike; that he probably resided a mile from the Princess Anne Turnpike Road. He was then asked, by petitioner's counsel, if he used Princess Anne Turnpike, and objection being made to this question, petitioner stated that it expected to show by this witness, in answer to the question, that witness could not get to Norfolk by using the Princess Anne Turnpike Road, unless he used the electric cars, and that he used said Princess Ann Turnpike Road in his business regularly, and had used it for many years, and that it is the only road he does use in his business. Nevertheless, the

12 Court sustained the objection, and refused to allow it to be asked or answered; to which action of the Court the petitioner excepted. The Court thereupon refused to sustain said Motion No. 6 to quash said report, as will appear from bill of exception No. 6 in the transcript of the record, Page 23.

To each and every action of the said Circuit Court in overruling the motions aforesaid, petitioner duly excepted, as will appear from the record in this case, and each motion was made without waiving

the exception to the action of the Court in over-ruling any motion or motions preceding the same.

After the actions of the Court aforesaid, the petitioner, upon further hearing of said appeal from the report of such viewers, introduced as a witness, W. R. Butcher, who testified that on Sunday, the 10th day of December, 1911, he had been over every foot of the turnpike roads in Princess Anne County, whereupon objection was made that evidence of the then present condition of the roads was incompetent and immaterial on the hearing of such appeal, and the Court having sustained such objection, petitioner excepted, as shown by its bill of exceptions No. 7, in the transcript of the record, P. 26.

Jurisdiction Herein of the Supreme Court of Appeals of Virginia.

From the statement of facts set forth above, it is clear that there are involved in the proceedings of the Circuit Court of Princess Anne County constitutional questions of grave importance arising both under the Constitution of Virginia, and the Constitution of the United States.

The Supreme Court of Appeals of Virginia has, therefore, jurisdiction, under Section 88, Article VI of The Constitution of
13 Virginia, to review and consider the propriety and validity and constitutionality of the judgment and order of the Circuit Court of Princess Anne County, complained of in this petition.

Assignments of Error and the Law.

A.

The first error assigned by the petitioner is as to the action of said Circuit Court in over-ruling Motion No. 1 of petitioner herein above mentioned.

It is proper to say that the legal questions raised by said Motion No. 1 were lately presented by your petitioner to the Supreme Court of Appeals of Virginia, in the case of, and as ground for, an application to the latter Court for a writ of prohibition to the Circuit Court of Norfolk County. The style of such case is Norfolk & Suburban Co. v. J. W. Stebbins et als., and the writ therein sought by petitioner was denied. In the order refusing the writ therein, however, it was recited that the application was based only on the claim that the statute under consideration violated section 156*a* of the Constitution of Virginia, and nothing was said therein as to the other two grounds, to-wit, that the statute was unconstitutional because it deprived petitioner of property without due process of law, and because it authorized the taking of petitioner's property for public use without compensation, and therefore, without due process of law, both in violation of the Constitution of Virginia, and the Constitution of the United States.

Neither is petitioner advised as to whether said Supreme Court of Appeals of Virginia in refusing said writ did so because it considered that prohibition would not lie in such a case under
14 the decision in Pizzini v. Grinnan, Judge, 5 Va. App. 173, or on grounds going to the merits of the questions presented.

For these reasons, and because this is an entirely distinct and separate proceeding, petitioner has, by its Motion No. 1, again presented in the present proceedings the same questions raised in the other proceedings.

Petitioner does not, however, present here anew the reasons which it thinks demonstrate the error of the Circuit Court of Princess Anne County in over-ruling said Motion No. 1, but is content to refer to the argument and brief filed on its behalf in the application for said writ of prohibition above referred to, and with which the Judges of said Supreme Court are already familiar; that litigation having been only recently before them.

B.

The second error assigned by your petitioner is to the action of said Circuit Court in over-ruling petitioner's Motion No. 2 hereinabove referred to.

This motion differed from Motion No. 1 in that by Motion No. 2 petitioner moved said Circuit Court not to enter any judgment, in the proceedings in question, confirming the report of the viewers therein, and by which the collection of tolls over the turnpike roads, and sections thereof, herein involved, would be suspended and travel and passage of the public thereover would be made free, because by any such judgment petitioner's property, both as to its tolls and as to its roads, would ex necessitate rei be taken for public use without just compensation and, therefore, without due process of law, contrary to those provisions of the Constitution of the United States, and of the Constitution of Virginia, mentioned and set up in Motion No. 2.

The distinction between Motion No. 1 and Motion No. 2 lies in the fact that by the first motion the statute is claimed to be unconstitutional because it authorizes or empowers the Court in its discretion to enter a judgment which might, under certain circumstances, operate to deprive the owner of a turnpike of his property without due process of law, whereas, by the second motion, objection is made to the entry of a judgment in such proceedings which does in fact, under the circumstances of this case, deprive petitioner of its property without due process of law. This distinction will become more apparent in the consideration of the argument hereinafter presented.

With this distinction in mind, petitioner begs to submit the following in support of its second assignment of error:

It is now well settled that the right of a public service corporation to reasonable remuneration, for the use by the public of its property, is itself a property right of such a nature that it is protected under the "due process of law" clause of Section 1 of Article XIV of the Constitution of the United States, and of which such a corporation can not be deprived without such due process.

Chicago &c. Ry. v. Minnesota, 134 U. S. 418.
Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362,
Covington &c. Turnpike Co. v. Sanford, 164 U. S. 578,
Smyth v. Ames, 169 U. S. 466.

It is also as equally well settled that the "due process clause" of Section 1, Article XIV of the Constitution of the United States applies with all its force to proceedings of any sort in any Court by which property is taken for public use in any way, without just compensation being made therefor, and that it makes no difference that the property is taken by the judgment of a court in a judicial proceeding, in which the owner of the property was a party,
16 had been served with process, and in which such owner had been permitted to defend and be heard.

Any such judgment, by which the owner's property is taken for public use without compensation, although the owner may have been a party to the action or proceedings, and heard therein in opposition to the entry of such a judgment, is a deprivation of the owner of his property so taken thereby, and such judgment itself, whether authorized by statute or not, violates the clause of the Constitution of the United States under consideration.

The leading case upholding this view is Chicago, Burlington &c. Railroad v. Chicago, 166 U. S. 226, in which the opinion of the Supreme Court was delivered by the late Mr. Justice Harlan, and the following language used by him:

"But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law, regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.'

Davidson v. New Orleans, 96 U. S., 97, 102. The same question could be propounded and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law, as ordained by the Fourteenth Amendment, then the final judgment of a State Court, under authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that Amendment. * * * The mere form of the proceedings instituted against the owner, even if he be permitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without due compensation."

17 The "due process" clause of the Constitution of Virginia, also relied upon by petitioner, has, of course, the same meaning as the like words in the Constitution of the United States and the authorities from the Supreme Court of the United States on that clause in the Fed-ral Constitution are applicable in ascertaining the meaning of the clause in both Constitutions.

Inasmuch as the right of your petitioner to its tolls, that is to reasonable remuneration for the use of its property by the public, is a property right, and protected by the provisions of both State and Federal Constitutions relied on, petitioner earnestly submits that to deprive it of this right of remuneration and also to turn over its property, to-wit, its very tangible property, to the public to be used by the latter without compensation of any sort to the petitioner is in gross violation of such constitutional provisions.

Such a judgment violates such Constitutions in two respects: (*a*) In taking away from petitioner the right to collect tolls, and (*b*) in turning over to the public for public use and without compensation petitioner's tangible property, that is, its roads, bridges, etc.; it takes away from petitioner its all, and that without any return whatsoever.

Petitioner submit*ts* that its second assignment of error is well taken.

C.

The third error assigned by the petitioner is to the action of the said Circuit Court in over-ruling Motion No. 3 of petitioner hereinabove mentioned.

This motion raises a question of great importance to the petitioner, involving its very exist*a*nce, and it asks for this assignment of error most careful consideration.

18 By this Motion No. 3, petitioner represented to the Circuit Court of Princess Anne County its ownership of the turnpike road, and sections thereof, located in said County, mentioned in said proceedings; that the very statute under which said proceedings were being prosecuted fixed and limited the tolls that could be charged the public by the petitioner for passage and travel over said turnpike road and the sections thereof; that petitioner conformed to said statute, and being thus limited in such tolls, had de*p*rived no income from said turnpike roads; the whole income therefrom, except certain interest charges which did not equal interest at the rate of one-half of one percentum per annum on what the very roads and sections thereof had cost petitioner about three years ago, or on the present value of said roads, had been expended in the maintenance and operation of said roads; that since March 1st 1911, said roads had paid nothing towards interest, though the interest had long since become due, and petitioner had expended in the operation and maintenance of said turnpike roads and sections thereof, since said date, more than had been received therefrom; that all expenditures made in the operation and maintenance of said turnpike roads and sections thereof had been made in an economical, proper and reasonable manner, and not in a wasteful or extravagant way; that no expenditures would increase the travel or passage over said turnpike roads, or the income derived therefrom, which was virtually fixed by law; and that said roads had been kept in as good repair as possible with the income received therefrom, which income the statute itself had limited by fixing the toll charges thereon. Petitioner pointed out the injustice of any judgment or order suspending the tolls on said turnpike roads and sections thereof, and

turning them over to the use of the public, in view of the facts set out above; alleged that any such judgment or order would violate the constitutional provisions aforesaid; and moved the Cir-
19 cuit Court of Princess Anne County to be allowed to introduce evidence to substantiate these facts, that said Circuit Court should enter no judgment or order in such proceedings until such evidence was heard; and finally moved that if such facts were substantiated by evidence the said Circuit Court should enter an order dismissing the proceedings in toto.

Said Circuit Court, however, promptly over-ruled petitioner's Motion No. 3 in every respect; it refused to hear any evidence to substantiate the facts represented to it in said Motion; it refused to with-old judgment until such evidence was heard, and it entered judgment and order by which the tolls of said turnpike roads, and sections thereof, were suspended, and said turnpike roads and sections thereof, were open to the public for use by the latter without compensation to your petitioner.

It is well established, and the petitioner is not disposed to dispute the proposition, that a state may impose fair and reasonable regulations on public service corporations, both as to their rates and in other respects. But it is also well established that such regulations must not be arbitrary, unreasonable, or of such a nature that the corporation can not comply therewith, and at the same time receive from the public for the use of its property a remuneration and compensation which is both just to itself and the public.

As said by Mr. Justice, now Chief Justice, White, in the course of his opinion in Atlantic Coast Line v. N. Car. Corp. Com'n, 206 U. S. at P. 20:

"As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the power of regulation
20 is exerted in such an arbitrary an- unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

It should also be remembered that the judgment and order complained of here is not in the exercise of the police power of the State. It is not an order to protect the morals, safety or health of the citizens of Virginia, or Princess Anne County. It is simply an exercise of governmental power to regulate the facilities afforded by a public service corporation for public convenience. Minneapolis &c. Railroad v. Minn., 187 U. S. 257. A judgment may be reasonable under the police power because necessary for the protection of the lives or health of citizens that may be very unreasonable if made simply in the exercise of the governmental power to regulate.

In the Railroad Commission cases 116 U. S., 307, 331, the Supreme Court held that the power in the States to regulate was not

unlimited, or without restraint. Chief Justice Waite declaring that "This power to regulate is not power to destroy, and limitation is not the equivalent of confiscation."

In Chicago &c. Co. v. Minn. 134 U. S. 418, the Supreme Court set aside a State law as unconstitutional because the rates fixed thereby were not sufficient to yield a fair return and therefore, deprived the railroad of its property without due process of law.

In the leading case of Reagan v. Farmers' Loan & Trust Co. 154 U. S. 362, the same court again declared that rates must be just and reasonable, and whether they were or not is a judicial question.

In Covington &c. Turnpike Co. v. Sanford, 164 U. S. 518, there was involved a law fixed rates of tolls for uses of a turnpike
21 and such law was held unconstitutional because the rates deprived the turnpike company of property without due process of law. In this latter case Mr. Justice Harlan said:

"This, as has been often observed, is a government of law and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. If the State were to seek to acquire title to these roads, under its power of eminent domain, is there any doubt that constitutional provision would require the payment to the corporatiaon of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take, not the title but the use for the public benefit at less than its market value?"

It is true that in all the foregoing cases the regulation complained of was a regulation of the rates to be charged by public service corporations at figures which would not yield to the owners a fair return on the value of the property regulated. The same principles apply, however, it is submitted, to other regulations of whatsoever nature which have the same effect.

If a regulation by statute of rates so low as to be unreasonable is a violation of the provisions of the Constitution, herein relied upon, a fortiori a statute which regulates rates and at the same time requires expenditures beyond the income received under such rates and is so stringent that, unless such excess expenditures are made, it provides that a person shall forfeit property rights, is also unconstitutional.

Not only is this true, but in your petitioner's case it asked the Court to allow it to introduce evidence to show precisely
22 what petitioner had received from its toll roads from the collection of the tolls which had been fixed by law, and beyond which petitioner could not go, and to show that it had *been* expended in a proper, economical and sensible way virtually all of such receipts from the respective toll roads involved, in the maintenance and the operation of the same, and to further show that

additional expenditures would not produce additional therefrom, and that the roads were in as good repair as possible, with the wise expenditures on them of the revenue produced from them.

Petitioner claims that to take its property and turn it over to the public and to suspend its right to take tolls under such circumstances violates the Constitutional provisions aforesaid, and yet the said Circuit Court refused to hear such evidence or to consider such questions.

Here is a statute which limits the rates to be charged, and a public service corporation which conforms to those rates thus fixed. Virtually all the income received from each of the respective turnpike roads with the rates thereon limited by law is immediately by reason of the same statute, expended on the respective turnpike roads from which it is received, in an economical, careful and unextravagant manner. Petitioner can get no more income from these roads with the rates fixed as they are under the law, and additional expenditures will not increase the receipts therefrom. With all this admitted, an order is entered by which the right of your petitioner to receive anything from said roads is destroyed, and said roads turned over for the use of the public without any compensation whatsoever to petitioner. If this be not taking property without due process of law, it is difficult to imagine any action, however arbitrary or tyrannical, which would be violative of the due process clause of the State and Fed-ral Constitutions.

23 On the one hand, limited by the statute in its income, petitioner is required by this judgment not only to give up its whole income in keeping the roads in repair, but to borrow money,—if it possibly can and it can not,—in order to make expenditures beyond said income on said roads from which additional expenditures it will receive no additional income. Surely this is not only unconstitutional, but intrinsically unjust and inequitable.

If a regulation fixing rates so low as to afford no compensation to a public service corporation is unconstitutional, then a fortiori regulation by which all income of a public service corporation is taken, and it is required to exhaust itself in spending more without any hope of return therefrom, is also unconstitutional.

24 D.

The fourth error assigned by petitioner is to the action of the Circuit Court in over-ruling its Motion No. 4.

By this motion petitioner asked the dismissal by said Circuit Court of these entire proceedings on the ground that the statute was too vague and indefinite to be enforced against petitioner, because by it no standard was fixed by which either the viewers who examined the turnpike roads, or said Circuit Court, were to be guided in determining whether or no said roads were in good repair

It must be remembered that the viewers arrived at their conclusion only from the examination of the roads, and that they do not take into consideration either the travel thereon, the nature and amount of such travel, the revenue derived therefrom, or the state of the weather which precedes such examination by them. They

have no standard by which to be guided except only their own views as to what is and what should be the condition of the roads being examined.

Now, what constitutes good repair is a matter upon which different minds may honestly differ. It is a matter of degree of repair and of different ideas of different men as to what degree of good condition is necessary to constitute good repair. It may vary with different sets of viewers and it is certainly apt to be placed at a very high degree when the viewers are composed of persons who use the roads every day in their business, and are subjected to the petty irritation of paying tolls, as was the case in the proceedings now sought to be reviewed.

Then again, when an adverse report is filed, and there is an appeal therefrom, the court below hears no evidence as to the condition of the roads at the time of such appeal,—at least the Circuit Court in the instant matter refused to hear such evidence,—and the report is treated as prima facie correct, and unless the owners of the roads shall show that the report was incorrect, it is confirmed by
25 the court, which makes no investigation of its own, and has no standard to guide it, except the report itself.

A perusal of the report in this cause will show that the viewers herein evidently had the idea that the said roads should be smooth in every respect.

When, in truth, is a turnpike road to be deemed "not in good repair"? Is it to be in such condition as to be absolutely impassible? or as to be dangerous? or as to be simply inconvenient to travel? Is it to be as smooth and level as a billiard-table throughout its length, or is it to simply be in such condition as will meet the approval of any three men who may be appointed to examine it? And if the latter, what will meet their approval, and what will not? And even if their approval is met, and also the approval of the Court, will the viewers next appointed under the statute coincide with their approval? All of these are practical questions to which the statute makes no answer.

The petitioner does not know, and cannot know, what it has to do to comply with the statute, as no standard is fixed thereby. It and its property is left at the mere whim and discretion of different sets of viewers appointed under the law, at intervals of four months. Petitioner has exhausted its every financial resource to meet this vague, indefinite, and variable standard fixed by the statute; it has given back to the public every cent received by it,—every cent that, under the law, it could receive from the roads. In operating and maintaining the roads, it has expended the entire income therefrom in a judicious, economical, and prudent manner. And notwithstanding all this, what is its reward? It is to be denied the right to take tolls, the roads are to be taken from it and turned over to the
26 public, because with all its efforts it has not met a standard, arbitrarily set up by three men, and approved by the court without any evidence, and which standard has not, and cannot be attained.

In Louisville & Nashville Railroad Company v. Commonwealth,

99 Ky., it was held that a statute inflicting a penalty on a railroad corporation which should charge, collect or receive more than a just or reasonable rate of compensation for passengers and freight was void and unconstitutional, because no standard was fixed, and no test laid down by which to determine what charges for such services were just or reasonable.

In the course of the opinion in that case, the court says:

"The criminality of the Carriers' Act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has a fixed rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the car-ier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be taking the property without due process of law and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws.

In Louisville &c. R. R. Co. v. Railroad Commission, 19 Fed. rep. 679, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): "Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporal, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power.

27 The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such "fair and just return". The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent, while another might acquit an accused who had demanded and received at the rate of six per cent, rendering the statute in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The petitioner thinks that this language is directly applicable

to the situation in this case, and submits that its fourth assignment of error is well taken.

E.

The fifth error assigned by the petitioner is to the action of said Circuit Court in over-ruling its Motion No. 5 herein above mentioned.

By this motion petitioner represented to the said Circuit Court that the report of the viewers, which is appealed from herein, had been filed in the clerk's office of said court on the 8th day of May, 1911, and this case was being tried on the 12th day of December, 1911, and that since the date of the filing of said report in the Clerk's Office, petitioner had spent an aggregate of $4,849.18 in repairing the turnpike roads, and sections thereof, involved in said proceedings; that the report of the viewers could not, therefore, truthfully represent the conditions of said turnpike at the time of the hearing of said appeal, or any recent condition thereof, and, therefore, petitioner moved said court that it refuse to confirm
28 the report of said viewers and dismiss the proceedings, or recommit said report, as provided by statute.

It will be noted that the statute under which these proceedings are being prosecuted gives the Circuit Court, on the hearing of any appeal from any report made in such proceedings, the power to confirm or not to confirm said report, or to make any order in the proceedings that it deems just and equitable.

This demonstrates that the appeal is to be heard by the Circuit Court with the broadest sort of scope as to the admission of evidence relative to the condition of the roads, past, present and future, and that the statute contemplates that said Circuit Court should make no or*d*r which would penalize the owner of a turnpike road, where such road at the time of the hearing of such appeal, was in good condition. If, pending the appeal from said report, said road has been put in good condition, and in good repair, by the owners of the turnpike, and the object of such report has been attained, it was never contemplated that the tolls should be taken off the turnpike and the same be made free to the public because, at the time of the examination of the same by the viewers, it happened to be temporarily not in good repair.

Petitioner submit*t*s that inasmuch as at the time of the hearing of the appeal the report of the viewers was seven months old, and a large amount of money had been spent in improving the roads duri*m*g the said seven months, it was error in said Circuit Court not to re-commit said report for further proceedings instead of confirming the same.

29 F.

The sixth error assigned by your petitioner is to the action of said Circuit Court in over-ruling its Motion No. 6.

By this motion petitioner moved said Circuit Court that it quash the report of the viewers, appealed from herein, on the ground

that the viewers making the same were disqualified to act because of interest, and because they lived on one or the other of said turnpike roads, or sections thereof, involved in said report.

On the hearing of this motion, petitioner introduced as witnesses two of said viewers, and one of them having testified that while he did not live on one of said turnpikes embraced in said report, he lived within three or four hundred yards of the same. The petitioner then asked him if he used said turnpike road regularly, and sought to show by said witness that he did use said turnpike road regularly. Upon objection, the question asked as to this, and evidence of the fact sought to be proved, was excluded by the court as immaterial and incompetent. The other of said witnesses testified that he lived about a mile from the Princess Anne turnpike, one of the roads involved in said report. Petitioner then sought to show by him that he used said turnpike regularly in his business, that it was the only road he did use, and that he could not reach the City of Norfolk except by using said road. The Court, however, refused to allow petitioner to introduce evidence of said fact, and excluded the question by which such evidence was sought to be elicited, and would not allow such evidence to be produced. Petitioner duly excepted to both of said rulings of the court excluding such evidence, and to the action of the Circuit Court in over-ruling its Motion No. 6.

The statute under which these proceedings are being prosecuted provides that the persons who are to examine any turnpike roads shall be "three freeholders not living on said road".—Vol. 1, Pollard's Code of Virginia, Section 1249*j*, clause (5).

The object of this statute is to secure to the turnpike companies the judgment of disinterested parties who are presumed, on account of lack of interest, to examine the roads without the prejudice arising from any interest in the question involved.

It is submitted that the words "living on said road" are not to be given a literal construction, but are to be construed so as to carry out the purpose of the legislature above outlined. The word "on" as used in said section means "near to", and not "living on" means being so situated with relation to said road as to be disinterested in the questions involved; in other words, the object of the legislature was to obtain disinterested viewers, and in applying the statute it should be so construed as to attain that object. On the words of the act alone, it is submitted that the Court erred in not admitting and considering the evidence aforesaid, offered as aforesaid, and in not sustaining petitioner's Motion No. 6.

Not only is this true, but the legislature itself is not competent to give interested persons the power to decide a case or question in which they are interested.

"No one ought to be a judge in his own case; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for jura naturlas sunt immutabilia, and they are leges legum' ".—Cooley's Constitutional Limitations, 410.

And again on page- 411-412, the author last quoted says:

"But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people, indeed, when framing their constitution, may establish so great an anomaly if they see fit, but if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that, which has never been recognized as being within the province of the judicial authority. To empower a party to a controversy to decide it for himself is not within legislative authority, because
31 it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.

Petitioner, therefore, submits that if this statute is to be construed as it has been construed by the judge of the said Circuit Court, the same is unconstitutional and beyond the power of the legislature. The Court either erred in excluding such evidence and in refusing to sustain petitioner's motion No. 6, or the statute under which the proceedings were being had is unconstitutional, as making an interested person a judge in his own case.

G.

The seventh error assigned by your petitioner is to the action of the Circuit Court in excluding direct evidence of the condition of the turnpike roads at the time of the hearing of the appeal in this case.

This evidence was offered by petitioner, but was excluded on the ground that no matter what was the good repair of the roads at the time of the appeal, the Court could not consider that in passing on the report of the viewers, but was limited to the consideration of the condition of the roads at the time of the examination of the same by the viewers, which was seven months previous to hearing of the appeal.

Petitioner has already discussed this question in its argument relative to its assignment of error No. 5 above, and it refers to what is there said relative thereto.

32 ***Conclusion.***

Petitioner, therefore, prays that it may be granted an appeal and writ of error, or either, to the judgment and order of the Circuit Court of Princess Anne County herein complained of, and that a supersedeas may be awarded petitioner to said judgment and order; that such judgment and order may be reviewed and reversed and annulled, and for such other relief as may be proper to be granted

your petitioner by the Supreme Court of Appeals of Virginia, and it will ever pray.

NORFOLK & SUBURBAN TURNPIKE COMPANY,
By NATH'L T. GREEN, *Att'y.*

NATH'L T. GREEN, *p. p.*

Received December 20th, 1911.

JAMES KEITH.

33 I, Nathaniel T. Green, an attorney at law, practicing in the Supreme Court of Appeals of Virginia do hereby certify that in my opinion the judgment and order of the Circuit Court of Princess Anne County, complained of in the foregoing petition, is erroneous, and that the same should be reviewed and reversed and annulled by the Supreme Court of Appeals of Virginia aforesaid.

Given under my hand this 19th day of December, 1911.

NATH'L T. GREEN.

34 VIRGINIA:

Proceedings Before the Circuit Court of Princess Anne County, at the Courthouse Thereof, on Tuesday, the 12th Day of December, 1911.

Be it remembered that heretofore, to-wit: In the Circuit Court of Princess Anne County, in vacation, on the 21st day of April, 1911, the following order of the Judge of the Circuit Court of Princess Anne County was received and entered in the Common Law Order Book of said Court:

In accordance with the provisions of Section Five, Chapter Ten, of Acts of 1902-3-4, pages 968-1007, approved January, 18, 1904, the Judge of the Circuit Court of Princess Anne County, in vacation, doth appoint Thos. Edmunds, C. F. Hodgman and W. B. Frizzell viewers for the purpose, who are directed after being duly sworn, to go upon or over that Turnpike owned by the Norfolk — Suburban Turnpike Company known as the Norfolk and Princess Anne Turnpike, and that portion of the turnpike owned by said Norfolk and Suburban Turnpike Company known as the London Bridge and Broad Creek Turnpike, and that portion of the Turnpike owned by said Norfolk — Suburban Turnpike Company, known as the Indian River Turnpike which lie in this County on the 27th day of April, 1911, at ten o'clock, A. M., if not the next fair day and examine the same and report the condition thereof as provided by Statute. Said viewers shall meet at Kempsville and thence proceed to view said turnpikes. All of which is certified to the Clerk of said Court, to be entered on the Common Law Order Book.

And afterwards, on the 8th day of May, 1911, Thomas Edmunds, C. F. Hodgman and W. B. Frizzell, the viewers appointed by the

foregoing order, filed in the Clerk's Office of this Court their report in the words and figures following:

35 VIRGINIA:

In the Circuit Court of Princess Anne County, in Vacation, on the 22nd Day of April, 1911.

The following order of the Judge of the Circuit Court of Princess Anne County, in vacation, on the 21st day of April, 1911, was this day received here, and the same is in the words following, to-wit:

"VIRGINIA:

In the Circuit Court of Princess Anne County, in Vacation, on the 21st Day of April, 1911.

In accordance with provisions of Section Five, Chapter Ten, of Acts of 1902-3-4, pages 968-1007, approved January 18, 1904, the judge of the Circuit Court of Princess Anne County, in vacation, doth appoint Thos. Edmunds, C. F. Hodgman and W. B. Frizzell viewers for the purpose, who are directed after being duly sworn, to go upon or over that portion of the turnpike owned by the Norfolk and Suburban Turnpike Company known as the Norfolk and Princess Anne Turnpike, and that portion of the Turnpike owned by said Norfolk and Suburban Turnpike Company known as the London Bridge and Broad Creek Turnpike, and that portion of the Turnpike owned by said Norfolk Suburban Turnpike Company, known as the Indian River Turnpike which lie in this County on the 27th day of April, 1911, at ten o'clock, A. M., if not the next fair day and examine the same and report the condition thereof as provided by statute. Said viewers shall meet at Kempsville and thence proceed to view said Turnpikes. All of which is certified to the Clerk of said Court, to be entered on the Common Law Order Book.

B. D. WHITE,
Judge Circuit Court of Princess Anne County, Virginia.

Teste:
A. E. KELLAM, *C. C.*,
By E. M. SENECA, *D. C.*

A copy, teste:
A. E. KELLAM, *C. C.*,
By E. M. SENECA, *D. C.*

36 *Report of Freeholders Appointed to View Certain Turnpikes in Princess Anne County, Virginia.*

We, Thos. Edmunds, C. F. Hodgman and W. B. Frizzell, freeholders named in the summons hereto attached, certify that after having been sworn, we have in pursuance thereto, examined the different sections herein mentioned, and report the condition of the same to be as follows:

We find that as to each of the sections examined, the conditions are practically the same.

1. That section of Princess Anne Turnpike lying wholly in the County of Princess Anne.

As no rain has fallen for some time, this road should have been in its best condition. Some holes had lately been filled with cinders; the road was rough in places caused by wheels making deep ruts in the mud which afterwards dried. In places, the road is worn down to the natural soil. Most of the road bed is lower in the center than on the sides, making the road saucer shape, so that there can be *do* drainage in wet weather; i. e., no connection being made by the ditches where there are any. The road is practically worn out, and is out of repair. And we make the following recommendations that at least from ten to twelve inches of shell should be put on the road to place it in a good condition, and we recommend that tolls be suspended on this section of Princess Anne Turnpike until the said sections shall be put in good repair.

2. That section of the Broad Creek Turnpike lying wholly within the County of Princess Anne:

As no rain has fallen for some time, this road should have
37 been in its best condition. Some holes had lately been filled with cinders; the road was rough in places caused by wheels making deep ruts in the mud which afterwards dried. In places, the road is worn down to the natural soil. Most of the road bed is lower in the center than on the sides, making the road saucer shape, so that there can be no drainage in wet weather; i. e., no connection being made by the ditches where there are any. The road is practically worn out and is out of repair. And we make the following recommendations that at least from ten to twelve inches of shell should be put on the road to place it in a good condition, and we recommend that tolls be suspended on this section of Broad Creek Turnpike until the said section shall be put in good repair.

3. That section of the Indian River Turnpike lying wholly within the County of Princess Anne:

As no rain has fallen for some time, this road should have been in its best condition. Some holes had already been filled with cinders; the road was rough in places caused by wheels making deep ruts in the mud which afterwards dried. In places, the road is worn down to the natural soil. Most of the road bed is lower in the center than on the sides, making the road saucer shape, so that there can be no drainage in wet weather; i. e., no connection being made by the ditches where there are any. The road is practically worn out, and is out of repair. And we make the following recommendations that at least from ten to twelve inches of shell should be put on the road to place it in a good condition, and we recommend that tolls be suspended on this section of Indian River Turnpike until the said section shall be put in good repair.

THOS. EDMUNDS,
C. F. HODGMAN,
W. B. FRIZZELL,
Viewers.

Dated at Norfolk, Va., April 29th, 1911.

38 And afterwards, to-wit: on the 10th day of May, 1911, the said Norfolk and Suburban Turnpike Company having been duly notified of the report filed herein, as aforesaid, said Norfolk and Suburban Turnpike Company appealed from said report to the Circuit Court of Princess Anne County, and said appeal was duly docketed in said Circuit Court of Princess Anne County.

And afterwards, at a Circuit Court continued and held for Princess Anne County, on Tuesday, the 12th day of December, 1911, the appeal of said Norfolk and Suburban Turnpike Company from said report herein above last mentioned came on to be heard, and there was entered therein the following order:

This day came the parties by their attorneys: and thereupon the Attorney representing the Turnpike Company *and* presented his several motions, Nos. 1, 2, 3, 4, and 5, which motions the Court overruled: to which opinion, judgment and ruling of the Court in overruling his motions, severally numbered 1, 2, 3, 4, and 5, the Turnpike Company excepted: and thereupon the said Turnpike Company moved the Court to quash the report filed in the Clerk's Office of Court on May the 6th, 1911, on the ground that P. L. Smith, one of the viewers in said order lived on the said turnpike road, which motion the Court sustained, and this cause coming on to be heard upon the report made by Thomas Edmonds, C. F. Hodgman and W. B. Frizzell, the three viewers appointed on April 21, 1911, to view said road: Whereupon the Attorney representing the Turnpike — moved the Court to quash the report on the ground that the report covered the three roads and that the Court should have appointed viewers for each road; which motion the Court overruled, for the reason that the several roads were owned by one company; and this cause proceeding to be further heard upon the papers formerly read herein, and upon the appeal taken from the decision of the viewers in this cause, and upon the evidence submitted
39 by the Turnpike Company and the petitioners, and the Court having fully considered the evidence doth confirm the said report, and doth order that all the tolls upon the following portions of the Turnpikes embraced in the report of Thos. Edmonds, C. F. Hodgman and W. B. Frizzell as follows:

1. That section of Princess Anne Turnpike lying wholly in the County of Princess Anne. And,—That section of the Broad Creek Turnpike lying wholly within the County of Princess Anne.

3. That section of the Indian River Turnpike lying wholly within the County of Princess Anne be forthwith suspended and remain suspended until said sections of said Turnpike road shall be put in good repair, and ascertained so to be in the manner provided by law. And upon the motion of the Attorney for the Turnpike Company, the Court quashes the reports made by O. B. Mears, J. D. Murden and Jacob Gettel, viewers, and filed in the Clerk's Office of this Court on May 6th, 1911, and the report of W. C. Bonney, Fred H. Henigst and W. T. Etheridge, Viewers, filed in the Clerk's Office of this Court on April 18th, 1911.

And the Court orders that the turnpike Company pay the costs of these proceedings to be taxed by the Clerk of this Court.

Memorandum: Upon the application of the Turnpike Company by their Attorney, the Court doth suspend the operation of this order for twenty days from this date.

And after the entry of the order herein last mentioned, to-wit: on the 19th day of December, 1911, the following order was entered in said proceedings:

In re appeal of Norfolk & Suburban Turnpike Company from the report of Thomas Edmunds, C. F. Hodgman and W. B. Frizzell, viewers, relative to the condition of certain turnpikes, and
40 sections thereof, in Princess Anne County, Virginia.

This day came the Norfolk & Suburban Turnpike Company by its Attorney and said Norfolk & Suburban Turnpike Company, having excepted on the hearing of its appeal herein to sundry rulings made on said appeal, tendered its seven bills of exception numbered 1, 2, 3, 4, 5, 6, and 7, which were received, signed and sealed by the Court, and are hereby ordered to be made a part of the record in this proceeding.

The bills of exceptions referred to in the last foregoing order are as follows:

41 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of Said Turnpikes, and Sections Thereof, in Princess Anne County, Va.

Bill of Exceptions No. 1.

Be it remembered that when the appeal from the report above mentioned was called for trial in this Court on the 12th day of December, 1911, the Norfolk & Suburban Turnpike Company, which had appealed from said report, appeared and made its Motion No. 1 in writing as follows:

"And now comes the Norfolk & Suburban Turnpike Company, in the above proceedings, and moves said Circuit court of Princess Anne County that it dismiss these proceedings in toto, because the Act of the General Assembly of Virginia, under which said proceedings are being prosecuted, and are now pending in this court, is unconstitutional and invalid in the following respects:

(1) Said statute is unconstitutional because jurisdiction in such matters, and to make such orders as are contemplated by these proceedings, is exclusively in the State Corporation Commission of Virginia, under section 156*a* of the Constitution of Virginia, and the Legislature of Virginia cannot confer on this Court jurisdiction of these proceedings or to enter any judgment herein such as is authorized by said Act of the General Assembly.

(2) Because said Act authorizes this court to enter a judgment by which, if the report of the viewers herein is confirmed, travel and passage over the sections of the Turnpike Roads and said turnpike roads involved herein, by the public, will be free and without
42 toll, and without any other compensation to said Norfolk & Suburban Turnpike Company, and, therefore, said Act authorizes the taking of the property of the said Norfolk & Suburban Turnpike Company for public use, without making any compensation therefor, in violation of that portion of section 1 of Article XIV of the Constitution of the United States, providing that no State shall "deprive any person of life, liberty, or property without due process of law," and that portion of section 11 of Article 1 of the Constitution of Virginia providing "That no person shall be deprived of his property without due process of law."

(3) Because said Act violates that *pro*tion of section 1 of Article XIV of the Constitution of the United States providing that no State shall "deprive any person of life, liberty or property without due process of law," and that *pro*tion of section 11 of Article 1 of the Constitution of Virginia providing that "No person shall be deprived of his property without due process of law."

Which motion in writing being considered by the Court, the Court over-ruled and denied the same, to which action of the Court in over-ruling and denying said motion said Norfolk & Suburban Turnpike Comapny then and there excepted, and tendered this, its Bill of Exceptions No. 1, which it prays may be signed, sealed and made a part of the record in said proceedings, and the same is accordingly done.

B. D. WHITE. [SEAL.]

43 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of Said Turnpikes, and Sections Thereof, in Princess Anne County, Va.

Bill of Exceptions No. 2.

Be it remembered that on the hearing of the appeal herein in this court by Norfolk & Suburban Turnpike Company from the report of the viewers, Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, filed in the Clerk's Office of this Court on the 8th day of May, 1911, and after said Norfolk & Suburban Turnpike Company had made its motion No. 1 set forth in Bill of Exceptions No. 1, said Norfolk & Suburban Turnpike Company, without waiving its said motion, made its Motion No. 2, in writing, as follows:

"Now comes the Norfolk & Suburban Turnpike Company and says that this court should enter no judgment herein confirming the report of said viewers, filed in the Clerk's Office herein, on the 8th day of May, 1911, because by any such judgment, passage and travel over the sections of the turnpike roads and said turnpike roads

herein involved by the public, would, thereby, be made free and without any compensation to said Norfolk & Suburban Turnpike Company, and that such judgment would, therefore, operate and have the effect of depriving said Norfolk & Suburban Turnpike Company of its property, without due process of law, in violation of that portion of section 1 of Article XIV of the Constitution of the United States providing that no State shall "deprive any person of life, liberty or property without due process of law," and that portion of section 11 of Article 1 of the Constitution of Virginia
44 providing "That no person shall be deprived of his property without due process of law."

Which motion in writing being considered by the Court, the Court overruled and denied the same, to which action of the Court in overruling and denying said motion said Norfolk & Suburban Turnpike Company then and there excepted, and tendered this, its Bill of Exceptions No. 2, which it prays may be signed, sealed and made a part of the record in said proceedings, and the same is accordingly done.

B. D. WHITE. [SEAL.]

45 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of said Turnpikes, and Sections Thereof, in Princess Anne County.

Bill of Exceptions No. 3.

Be it remembered that when the appeal from the report above mentioned was called for trial in this court on the 12th day of December, 1911, the Norfolk & Suburban Turnpike Company, which had appealed from said report appeared and without waiving its preceding motions Nos. 1 and 2, made its motion No. 3 in writing, as follows:

"And now comes the Norfolk & Suburban Turnpike Company in the above proceedings and represents to said Circuit Court of Princess Anne County, Virginia, as follows:

First, that it is the owner of the turnpike roads and sections thereof relative to which the report of the viewers appointed herein was filed in the Clerk's Office of this Court on the 8th day of May, 1911, from which said report said Norfolk & Suburban Turnpike Company has appealed to this Court.

Second, that it purchased said property and went into possession of the same on the 1st day of July, 1908, and has operated the same continuously from said time, and at no time since then have any viewers appointed under the laws of Virginia reported said sections or said turnpike roads as not in good repair, but have reported to the contrary.

Third, that by the same Act of the General Assembly of
46 Virginia and amendments thereto, under which the proceedings herein are now pending and being prosecuted in this

Court, the tolls which said Norfolk & Suburban Turnpike Company could and can charge for passage over said sections of said turnpike road and said turnpike roads for all classes of persons and things are fixed and limited and provision made for the punishment by fine of a violation of said act in the collection of tolls in excess of the amounts fixed thereby.

Fourth, that said Norfolk & Suburban Turnpike Company has in the collection of tolls for travel or passage over its turnpikes and especially over the turnpike roads and sections thereof herein involved conformed at all times to the tolls fixed and limited by said act.

Fifth, that said Norfolk & Suburban Turnpike Company during its ownership of said turnpike roads and sections thereof herein involved has expended in the operation and maintenance of same all the tolls and moneys ever received by it therefrom directly or indirectly with the exception of a small amount of money representing the proportion of yearly interest which said sections of said turnpike roads and said turnpike roads equitably have to bear of the yearly interest on a mortgage covering said sections and turnpike roads and other turnpikes, which said proportion of yearly interest borne by said sections of said turnpike roads and said turnpike roads is very small and in amount will not equal interest at one-half per centum per annum on the real value of said sections of said turnpike roads or said turnpike roads or on the original purchase price thereof paid by said Norfolk & Surburban Turnpike Company therefor.

Sixth, that the expenditures which said Norfolk & Suburban Turnpike Company have made as aforesaid in the operation
47 and maintenance of said sections of said turnpike roads and said turnpike roads have been properly and judiciously made, and said expenditures have been made in a reasonable and unextravagant manner and not in a wasteful or injudicious way.

Seventh, that since the first day of March, 1911, said Norfolk & Suburban Turnpike Company has in the operation and maintenance of said sections of said turnpike roads and said turnpike roads expended an amount of money in excess of what has been received in any way directly or indirectly therefrom and the said amount so expended by it for said purposes since said first of March, 1911, was expended in the same manner as herein above alleged in paragraph sixth hereof as to the other expenditures made by it; and since said 1st of March, 1911, said sections and said turnpike roads have paid nothing towards the interest on the mortgage by which they are covered as hereinabove set out, although the interest on said mortgage became payable since said date.

Eighth, that said sections and said turnpike roads are operated, kept and maintained in as good repair as possible with the revenue received therefrom, which revenue is limited because of the fact that the tolls charged for passage of all classes of persons and things over the same are fixed by the Act of Assembly as herein above mentioned and said Norfolk & Suburban Turnpike Company by reason of such act can obtain no additional revenue therefrom by an increase of the tolls thereon.

Ninth, that although said sections and said turnpike roads are of large value and were purchased by said Norfolk & Suburban Turnpike Company on the 1st day of July, 1908, at a reasonable price yet said Company has never derived therefrom any income or any return on the purchase price paid therefor or on the value
48 but same has proven, by reason of the limitation of the toll charges thereon as hereinabove set forth and the expenditures made thereon as aforesaid, a losing investment to said Norfolk & Suburban Turnpike Company.

Tenth, that any judgment rendered by this court in these proceedings in view of the matters hereinabove set forth or without considering said matters and hearing evidence relative thereto and by which judgment the collection of tolls on said sections or said turnpike roads will be suspended, will be not only unjust and inequitable, but will violate that portion of Section 1 of Article XIV of the Constitution of the United States providing that no State shall "deprive any person of life, liberty or property without due process of law" and that portion of Section 11 of Article 1 of the Constitution of Virginia providing "that no person shall be deprived of his property without due process of law" in that any such judgment would deprive said Norfolk & Suburban Turnpike Company of its property without due process of law.

Eleventh, That additional expenditures on said sections and said turnpike roads would not increase the passage and travel over the same and the revenue derived therefrom would not be in any wise increased from that now derived therefrom.

Twelfth, that said Norfolk & Suburban Turnpike Company therefore moves this Court as follows:

1. That it may be allowed to produce evidence before this Court to substantiate and prove the matters and facts hereinabove stated and that said Court hear and consider the same.

2. That after hearing and considering the same this Court refuse to confirm the report of the viewers herein and dismiss these proceedings.

3. That, should said Court refuse to hear and consider said
49 evidence, said Court enter no judgment herein by which tolls will be suspended on the sections or turnpike roads involved in these proceedings or any other judgment than a judgment refusing to confirm said report of said viewers."

Which motion in writing being considered by the Court, the court overruled and denied the same, to which action of the court in overruling and denying said motion, said Norfolk & Suburban Turnpike Company then and there excepted, and tendered this, its Bill of Exceptions No. 3, which it prays may be signed, sealed and made a part of the record in said proceedings, and the same is accordingly done.

B. D. WHITE. [SEAL.]

50 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of said Turnpike, and Sections Thereof, in Princess Anne County.

Bill of Exceptions No. 4.

Be it remembered that on the hearing of the appeal herein in this Court by the Norfolk & Suburban Turnpike Company from the report of the viewers, Thomas Edmunds, C. F. Hodgman and W. B. Frizzell, filed in the Clerk's Office of this court on the 8th day of May, 1911, and after said Norfolk & Suburban Turnpike Company had made its motions Nos. 1, 2, 3, said Norfolk & Suburban Turnpike Company, without waiving its said motions Nos. 1, 2 and 3, made its Motion No. 4, in writing to this court, as follows:

"And now comes the Norfolk & Suburban Turnpike Company and moves this court that it dismiss these proceedings in toto as illegal and invalid, because the Act of the General Assembly of Virginia, under which these proceedings are now pending in this court, and being prosecuted therein, is too vague and indefinite to be enforced as contemplated by said Act, in that said Act fixes no standard by which the viewers appointed thereunder, and this court in these proceedings could or can determine whether said roads are out of repair, in good repair, or in insufficient repair, and leaves entirely to the discretion of said viewers to be determined by them only from an inspection of the sections of the turnpike roads herein involved, whether, in their opinion, said sections of said turnpike roads are out of repair, not in good repair, or in insufficient repair,

51 and leaves said Norfolk & Suburban Turnpike Company, and its rights, entirely to the discretion of said viewers in making their report, and to said court in acting thereon, without any rules or standard by which to be guided."

Which motion in writing being considered by the court the court overruled and denied the same, to which action of the court in overruling and denying said motion said Norfolk & Suburban Turnpike Company then and there excepted, and tendered this, its Bill of Exceptions No. 4, which it prays may be signed, sealed and made a part of the record in said proceedings, and the same is accordingly done.

B. D. WHITE. [SEAL.]

52 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of said Turnpike, and Sections Thereof, in Princess Anne County.

Bill of Exceptions No. 5.

Be it remembered that on the hearing of the appeal herein in this court by the Norfolk & Suburban Turnpike Company from the report of the viewers, Thomas Edmunds, C. F. Hodgman and W. B. Frizzell, filed at the Clerk's Office of this Court on the 8th day of May, 1911, and after said Norfolk & Suburban Turnpike Company had made its Motions Nos. 1, 2, 3 and 4, said Norfolk & Suburban Turnpike Company, without waiving its said Motion-Nos. 1, 2, 3 and 4, made its motion No. 5, as follows:

"Now comes Norfolk & Suburban Turnpike Company, and without waiving any other objections and motions made by it in these proceedings, but expressly insisting thereon, and representing to this court that the report of the viewers filed herein was filed in the Clerk's Office of this Court on the 8th day of May, 1911, and that since the date of said report said Norfolk & Suburban Turnpike Company has expended large sums of money, to-wit: $1484.65 in repairing the Norfolk & Princess Anne Turnpike, of which a section is involved in the proceedings; $1517.76 in repairing the Broad Creek Turnpike, of which a section is involved in these proceedings, and $1846.77 in repairing the Indian River Turnpike of which a section is involved in these proceedings; and in repairing all of said sections and the said report of said viewers cannot, therefore, truthfully represent the present conditions of said sections of said turnpike roads or said turnpike roads, or any recent condition of said sections of said turnpike roads, and, therefore, said Nor-
53 folk and Suburban Turnpike Company moves this Court that it do not confirm the report of said viewers, but that it shall refuse to confirm the same, and shall dismiss these proceedings, or re-commit said report as provided by statute."

Which motion being considered by the Court, the Court overruled and denied the same, to which action of the Court in overruling and denying said motion said Norfolk & Suburban Turnpike Company then and there excepted, and tendered this, its Bill of Exceptions No. 5, which it prays may be signed, sealed and made a part of the record in said proceedings, and the same is accordingly done.

B. D. WHITE. [SEAL.]

54 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of said Turnpike, and Sections Thereof, in Princess Anne County.

Bill of Exceptions No. 6.

Be it remembered that on the trial of the appeal herein after the said Norfolk & Suburban Turnpike Company had made its several motions, as set out in Bill of Exceptions Nos. 1, 2, 3, 4 and 5, and without waiving its motions herein made, said Norfolk & Suburban Turnpike Company moved the court, as its Motion No. 6, that it quash the report of the viewers appealed from herein, on the ground that the viewers making the same were disqualified to act because of interest and because they lived on one or the other of said turnpike roads, or sections thereof, involved in said report, and used the same regularly in their business. And to support the said motion so made, said Norfolk & Suburban Turnpike Company introduced a witness, Thomas Edmunds, who was one of the viewers making the report aforesaid, and after the said Thomas Edmunds had testified that, although he did not live on any of said turnpike roads or sections, yet he lived about three hundred yards from the Broad Creek Turnpike Road involved in said proceedings, and used it and traveled over the same, the said Thomas Edmunds was asked by counsel appearing for said Norfolk & Suburban Turnpike Company whether he used said Broad Creek turnpike road and sections thereof regularly, to which question objection was made by counsel appearing for various citizens, on the ground that it was incompetent and immaterial, whereupon it was stated to the court that said Norfolk and Suburban Turnpike Company expected to show by said witness that he did use said Broad Creek Turnpike Road, and sections thereof, involved in these proceedings, regularly, but

55 the court sustained said objection to such question, and did not allow the same to be asked or answered, to which action of the court in not allowing said question to be asked and answered, the said Norfolk and Suburban Turnpike Company then and there excepted.

And thereupon said Norfolk & Suburban Turnpike Company introduced as a witness C. F. Hodgman, another one of the viewers making said report appealed from herein, and after the witness Hodgman had testified that he lived at Diamond Springs, and that Diamond Springs proper was not on any turnpike road, and that his residence was probably a mile from the Princess Anne Turnpike, which was involved in these proceedings, the counsel for Norfolk & Suburban Turnpike Company then asked said witness C. F. Hodgman if he used said Princess Anne Turnpike regularly in his business, and objection being made to this question by counsel representing various citizens herein, said Norfolk & Suburban Turnpike Company stated to the Court that it expected to show by the witness,

in answer to the question, that the witness and all other citizens of said county could only get to Norfolk by using Princess Anne Turnpike or the other turnpikes involved in this report, unless he used electric cars, and that said witness used said Princess Anne Turnpike road in his business regularly, and had used it for many years, and that it is the only road he does use in his business; but the court sustained the objection to such question, and refused to allow same to be asked or answered, to which action of the court in refusing to allow such question to be asked and answered, and sustaining said objection, said Norfolk and Suburban Turnpike Company then and there excepted.

And the evidence above being all the evidence introduced on this motion No. 6, the court overruled and denied said motion, to which action of the Court said Norfolk & Suburban Turnpike
56 Company then and there excepted.

And the said Norfolk & Suburban Turnpike Company prays the court that this, its Bill of Exceptions No. 6 showing the matters and objections hereinabove stated, may be sealed, signed, and made a part of the record in this case, and the same is accordingly done.

B. D. WHITE. [SEAL.]

57 In the Circuit Court of Princess Anne County, Va.

In re Appeal of Norfolk & Suburban Turnpike Company from the Report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, Viewers, Relative to the Condition of said Turnpikes, and Sections Thereof, in Princess Anne County.

Bill of Exceptions No. 7.

Be it remembered that on the hearing of the appeal in this case from the report of the viewers herein and after making the respective motions set forth in Bills of Exceptions Nos. 1, 2, 3, 4, 5 and 6, said Norfolk & Suburban Turnpike Company introduced as a witness, one W. R. Butcher, who testified that on Sunday, the 10th day of December, 1911, he had been over every foot of turnpike roads in Princess Anne County involved in these proceedings, whereupon objection was made by counsel representing various citizens, that evidence of the present condition of the turnpike roads and sections thereof, involved in said report, was incompetent and immaterial, on the hearing of this appeal, and said Norfolk & Suburban Turnpike Company stated to the Court that it desired to show by said witness that at the time of the hearing of said appeal said turnpike roads were in good repair, and in good condition, but the court deeming such evidence incompetent and immaterial, sustained the objection thereto, and would not allow said evidence to be introduced, to which action of the court in sustaining said objection and excluding said evidence, the Norfolk & Suburban Turnpike Company, then and there excepted, and prays that this, its Bill of Exception No. 7 may be signed, sealed and made a part

of the record in these proceedings, and the same is accordingly done, and the court doth further certify that no other evidence whatsoever was introduced on the hearing of such appeal.

B. D. WHITE. [SEAL.]

58 VIRGINIA:

In the Clerk's Office of the Circuit Court of Princess Anne County, on the 19th day of December, 1911, I, A. E. Kellam, Clerk of the Circuit Court of Princess Anne County, do hereby certify that the foregoing is a true abstract of the record in the matter of the appeal of Norfolk & Suburban Turnpike Company from the report of Thomas Edmunds, C. F. Hodgman, and W. B. Frizzell, viewers, relative to the condition of certain turnpikes and sections thereof in Princess Anne County, Virginia, which said report was filed in the Clerk's Office of this Court on the 8th day of May, 1911.

I further certify same was not made up and completed and delivered until counsel appearing for various citizens had received the due notice of making the same, and of the intention of Norfolk and Suburban Turnpike Company to apply to the Supreme Court of Appeals of Virginia for supersedeas to the judgment and order of December 12th, 1911, herein.

Teste:

A. E. KELLAM,
Clerk of the Circuit Court of Princess Anne County, Virginia.

A copy.
Teste:

——— ———, *C. C.*

59 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Thursday, the 11th Day of January, 1912.

The petition of the Norfolk & Suburban Turnpike Company, a corporation, for a writ of error and supersedeas to a judgment or order entered by the Circuit Court of Princess Anne County, on the 12th day of December, 1911, in certain proceedings pending in said court, whereby the collection of tolls by the said petitioner on certain sections of a turnpike located in said county was suspended, having been maturely considered and the transcript of the record of the judgment or order aforesaid seen and inspected, the court being of opinion that the said judgment or order is plainly right, doth reject said petition.

A copy,
Teste:

H. STEWART JONES, *C. C.*

60 *Authentication of Record.*

Supreme Court of Appeals of the State of Virginia.

I, H. Stewart Jones, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in said office, and that said originals, together, constituting the record of the proceedings of said court in the case of In re Norfolk & Suburban Turnpike Company.

Witness my hand and the seal of the said Court, this the 29th day of January, 1912.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES, *Clerk.*

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this 29th day of January, 1912.

JAMES KEITH, [SEAL.]
President.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court, this the 29th day of January, 1912.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES, *Clerk.*

61 In the Supreme Court of Appeals of the State of Virginia.

In re Proceedings from the Circuit Court of Princess Anne County, Virginia, in the Matter of Certain Toll Roads, Known as Indian River Turnpike Road, Broad Creek Turnpike Road, and Norfolk and Princess Anne Turnpike Road, and Sections Thereof Located in Princess Anne County, Virginia.

Assignments of Error.

Comes now the Norfolk & Suburban Turnpike Company in the above entitled proceedings and shows that in the record and proceedings above, the Supreme Court of Appeals of the State of Virginia and the Circuit Court of Princess Anne County, Virginia erred to the grievous injury of the Norfolk & Suburban Turnpike Com-

pany herein, and to the prejudice and against the rights of the said Norfolk & Suburban Turnpike Company in the following particulars, to-wit:

1st. The said Circuit Court of Princess Anne County, Virginia, erred in holding that the statute, under which said proceedings were instituted and prosecuted, was constitutional and valid and did not violate Section 1, Article XIV of the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law.

2nd. Said Circuit Court of Princess Anne County, Virginia, erred in overruling the motion of said Norfolk & Suburban Turnpike Company, designated as Motion No. 2, that said Circuit Court enter no judgment, in the proceedings aforesaid, confirming the report of the viewers of the turnpike roads in these proceedings mentioned, and erred in entering judgment in said proceedings

62 confirming said report of said viewers, for the reason that, by the judgment so entered, the Norfolk & Suburban Turnpike Company was deprived of its property without due process of law in violation of Section 1, Article XIV of the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law.

3rd. Said Circuit Court of Princess Anne County, Virginia, erred in overruling the motion, designated as Motion No. 3, of said Norfolk & Suburban Turnpike Company, and in refusing under said motion, to allow the Norfolk & Suburban Turnpike Company to produce evidence before said Circuit Court to substantiate the matters and facts in said Motion No. 3 specifically set forth, and in refusing to hear and consider any evidence under said motion, thereby depriving the said Norfolk & Suburban Turnpike Company of its rights to be heard in said proceedings on the matter set forth in said Motion No. 3, and depriving by the denial of said motion, said Norfolk & Suburban Turnpike Company of its property without due process of law in violation of Section 1, Article XIV of the Constitution of the United States.

4th. Said Supreme Court of Appeals of the State of Virginia erred in refusing to grant a writ of error or appeal to the Norfolk & Suburban Turnpike Company from the final judgment and order of the Circuit Court of Princess Anne County in the proceedings aforesaid, inasmuch as said Supreme Court of Appeals of Virginia failed to consider and decide that the said Circuit Court of Princess Anne County had erred in said proceedings in the respects as to which the foregoing assignments of error Nos. 1, 2, and 3 are made to

63 the said judgment and order of said Circuit Court of Princess Anne County.

Wherefore, for this and other manifest errors appearing in the record, said Norfolk & Suburban Turnpike Company, a corporation, prays that the judgment and decision of the said Supreme Court of Appeals of the State of Virginia and the judgment and order of the Circuit Court of Princess Anne County, Virginia, be reversed and set aside and held for naught, and that judgment be entered for the Norfolk & Suburban Turnpike Company, granting it its rights under

the Constitution of the United States, and the said Norfolk & Suburban Turnpike Company also prays judgment for its costs.

NATH'L T. GREEN,
Attorney for Norfolk & Suburban Turnpike Company.

64 Supreme Court of Appeals of the State of Virginia.

In re Proceedings from the Circuit Court of Princess Anne County, Virginia, in the Matter of Certain Toll Roads, Known as Indian River Turnpike Road, Broad Creek Turnpike Road, and Norfolk and Princess Anne Turnpike Road, and Sections Thereof, Located in Princess Anne County, Virginia.

Petition for a Writ of Error.

Considering itself aggrieved by the final decision and judgment of the Supreme Court of Appeals of the State of Virginia in refusing a writ of error and appeal to the final judg- and order of the Circuit Court of Princess Anne County in the above entitled proceedings, and also considering itself aggrieved by the final order and judgment of the Circuit Court of Princess Anne County in said proceedings, the Norfolk & Suburban Turnpike Company hereby prays a writ of error from the said decision and judgment of the Supreme Court of Appeals of Virginia, and from the said judgment and order of the Circuit Court of Princess Anne County, to the Supreme Court of the United States. Assignments of error herewith.

NATH'L T. GREEN,
Attorney for Norfolk & Suburban Turnpike Company.

STATE OF VIRGINIA,
Supreme Court of Appeals:

Let the writ of error issue upon the execution of a bond by the Norfolk & Suburban Turnpike Company, a corporation, to
65 the Commonwealth of Virginia in the sum of $1,000, said bond, when approved, to act as a supersedeas to the decision and judgment of the Supreme Court of Appeals of Virginia aforesaid, and to the judgment and order of the Circuit Court of Princess Anne County aforesaid.

Dated this 13th day of January, 1912.

JAMES KEITH,
President of Supreme Court of Appeals of the State of Virginia.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of Virginia:

Because in the record and proceedings, as also the rendition of the judgment in a proceedings, which is in the said Supreme Court

of Appeals of Virginia, before you, on application for a writ of error to the judgment and order of the Circuit Court of the County of Princess Anne, Virginia, at the December term 1911 thereof, in certain proceedings in the matter of certain toll roads known as Indian River Turnpike Road, Broad Creek Turnpike Road, and Norfolk and Princess Anne Turnpike Road, and sections thereof located in Princess Anne County, Virginia, whereof the Norfolk and Suburban Turnpike Company is the owner, a manifest error has happened, to the great damage of the said Norfolk and Suburban Turnpike Company, to which judgment and order the Supreme Court of Appeals of Virginia subsequently, to-wit, on the 11th day of January, 1912, refused a writ of error, thereby affirming said judgment of said Circuit Court of Princess Anne County, Virginia.

We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, — that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States
67 Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of January, 1912. Done in the city of Richmond, with the seal of the District Court of the United States for the Eastern District of Virginia, attached.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the United States District Court
for the Eastern District of Virginia.

Allowed.

JAMES KEITH,
President of the Supreme Court
of Appeals of Virginia.

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of Virginia on the 13th day of January, 1912.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

68 Copy.

Supreme Court of the United States.

Bond.

Know all men by these presents, that we, the Norfolk and Suburban Turnpike Company, as principal, and National Surety Company, as surety, are held and firmly bound unto the Commonwealth of Virginia in the sum of — dollars ($—) to be paid to the Commonwealth of Virginia, to which payment, well and truly to be made, we bind ourselves jointly and severally, by these presents.

Sealed with our seals and dated this — day of January, 1912.

Whereas the above named Norfolk and Suburban Turnpike Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment renderd in the above entitled proceedings by the Circuit Court of Princess Anne County, Virginia, which judgment was affirmed by the refusal of the Supreme Court of Appeals of the State of Virginia to grant a writ of error thereto or an appeal therefrom.

Now, therefore, the condition of this obligation is such that if the above named Norfolk and Suburban Turnpike Company shall prosecute its said writ of error to effect and answer all costs and damages that may attach, if *they* shall fail to make good this plea, then this obligation is to be void; otherwise to remain in full force and effect.

[Seal Norfolk and Suburban Turnpike Co., Norfolk, Va.]

NORFOLK AND SUBURBAN TURNPIKE COMPANY,

(Signed) By W. R. BUTCHER, *Treasurer.*

69 NATIONAL SURETY COMPANY.

(Signed) By LOWERY D. FINLEY, *Att'y in Fact.*

This bond is approved.

(Signed) JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing bond was lodged with the Clerk of the Supreme Court of Appeals of Virginia on the 13th day of January, 1912, and the following endorsement was made thereon:

Bond. Filed, January 13, 1912. H. Stewart Jones, Clerk Supreme Court of Appeals of Virginia.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of Virginia, wherein the Norfolk and Suburban Turnpike Company is plaintiff in error and you defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 13th day of January, 1912.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Atteste:

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

RICHMOND, VIRGINIA, *January* 13, 1912.

I, Sam'l W. Williams, Attorney General of the State of Virginia, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States without admitting that the Commonwealth of Virginia is proper party and reserving all rights.

SAM'L W. WILLIAMS,
Commonwealth's Attorney of Princess Anne County.

Endorsed on cover: File No. 23,038. Virginia Supreme Court of Appeals. Term No. 962. The Norfolk and Suburban Turnpike Company, plaintiff in error, vs. The Commonwealth of Virginia. Filed February 2, 1912. File No. 23,038.

IN THE

Supreme Court of the United States

OCTOBER TERM, 191[illegible]

No. 282.

THE NORFOLK & SUBURBAN TURNPIKE COMPANY, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF VIRGINIA, *Defendant in Error.*

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR UPON MOTION BY THE DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

[illegible]

Counsel for the Norfolk & Suburban Turnpike Co.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 962.

THE NORFOLK & SUBURBAN TURNPIKE COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR UPON MOTION BY THE DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

This is a motion to dismiss a writ of error to the Supreme Court of Appeals of Virginia or to affirm the judgment sought to be reviewed thereby on the ground that the questions involved are frivolous and the writ of error was sued out for delay.

Plaintiff in error is a corporation owning certain turnpikes in Princess Anne and Norfolk Counties, Virginia. Its ownership thereof began in July, 1908, as a

consequence of certain foreclosure proceedings under a mortgage on said turnpikes, which were then owned and operated by the Consolidated Turnpike Company; the plaintiff in error becoming the purchaser of said property at the foreclosure sale under said mortgage as a result of efforts of the bondholders secured thereby to protect themselves at said sale.

In April, 1911, there were instituted in the Circuit Courts of Norfolk and Princess Anne Counties aforesaid, several proceedings under the Virginia statute hereinafter mentioned seeking to have the collection of tolls on all of the turnpikes owned by the plaintiff in error suspended, on the ground that said turnpikes were not in good repair. All of those proceedings, except the one in this case involved, were instituted by individuals, and the one excepted was instituted upon the initiative of the Circuit Court of Princess Anne County.

Upon the institution of all of said proceedings, plaintiff in error filed a petition before the Supreme Court of Appeals of Virginia praying a writ of prohibition to the further prosecution of one of the proceedings in the Circuit Court of Norfolk County, on the grounds: (1) that, under the Constitution of Virginia, jurisdiction of such matters as were involved therein was exclusively in the State Corporation Commission of Virginia, and (2) that the statute, under which the proceedings was being prosecuted, was unconstitutional in that it authorized the taking of plaintiff's in error property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

This petition for a writ of prohibition was presented to the Supreme Court of Appeals of Virginia at the March, 1911, session of that Court, and upon argument by counsel was submitted for final decision at that session. That Court held the case under advisement until November, 1911, in the meantime temporarily restraining the proceedings sought to be prohibited, and finally refused the writ of prohibition without any opinion in the case and without assigning any reasons for such refusal. Plaintiff in error did all in its power to obtain an early decision of this application for a writ of prohibition, and the delay therein is not attributable to it or any lack of effort or diligence on its part.

This much has been stated to dispel the idea conveyed in the brief of the defendant in error that by the procedure in these matters, plaintiff in error has sought merely delay. The contrary is true. Plaintiff in error has taken promptly and prosecuted diligently only such legal steps as were necessary to the preservation of what it conceived to be its legal and constitutional rights, and has done nothing looking to delay or to avoid a prompt decision thereon.

With this premise, and pausing only to note (1) that the present proceedings were instituted upon the initiative of the Circuit Court of Princess Anne County and not by individuals, (2) that only one of the Federal questions, to be decided by this Court and involved in this case, was raised in the application for a writ of prohibition beforementioned, (3) that this is an entirely different proceedings from the one sought to be restrained by the prohibition application, and (4) that the reasons for the refusal of the writ of prohibition by the

Supreme Court of Appeals of Virginia—whether because of the merits or because of an adequate remedy by appeal on the plaintiff's in error part—did not appear and are not known, it is now necessary to state distinctly what the proceedings sought to be reviewed here are and what are the questions to be here decided, omitting from such statement such questions as are not of a Federal nature.

The proceedings originated under chapter X of "An act concerning Public Service Corporations" to be found in Acts of Assembly of Virginia, 1902-03-04 at P. 968, and amendments of said Act. The provisions thereof, so far as pertinent here, will also appear from clauses (5), (6), (7), (8), (9) and (10) of section 1294j of Pollard's Code of Virginia, and subsequent amendment of clause (9) thereof will appear from Volume 3, Pollard's Code of Virginia—Supplement of 1910 to said Code—at the bottom of page 193; and an amendment of clause (10) will be found in Volume 3, of Pollard's Code of Virginia, at the bottom of page 14.

By said statutes and amendments thereto it is, among other matters, provided that the Circuit Court, or Judge thereof in vacation of each county in Virginia, wherein there is a turnpike road, shall, in the months of April, August and December of each year, appoint three freeholders, not living on said road, as "viewers for each of said turnpike roads in his county" who shall, at a time to be specified in the order, examine the same and each section thereof—Volume 1 Pollard's Code of Virginia, Section 1294j, clause (5).

Said freeholders so appointed are to meet as provided by the order, take an oath to faithfully perform

their duty and make a report of the conditions of the section to the Court, said report to be in the form provided by the statute—Volume 1, Pollard's Code of Virginia, Section 1294j, clauses (6) and (7).

Said report is to be returned to the Clerk's office of the court to be preserved and recorded, and provision is made as to who shall pay the fees therefor—Volume 1, Pollard's Code of Virginia, Section 1294j, clause (8).

It is further provided that if any section or sections of the turnpike road so examined is pronounced by the report to be out of repair, tolls thereon shall be suspended from the time said report is filed in the Clerk's office, unless an appeal be taken from the said report to the Circuit Court, and if the report is confirmed on such appeal, then the tolls shall be suspended from the date of the judgment or order of confirmation. Upon the hearing of any such appeal from said report the court is authorized to confirm, set aside, or re-commit the said report, or enter such order in the proceedings as it may deem advisable. If the tolls are suspended, they are to stand suspended until the road, or section affected, is put in good repair, to be ascertained on application of the owner of the turnpike to a magistrate, who shall issue warrants to three freeholders to meet on the road, or sections, and ascertain whether the same is in good repair, and the subsequent proceedings on this last report are the same as on the original report.

It should also be carefully noted here that by said Act the rates which can be charged by an owner of a turnpike for the travel and passage of persons and things over its turnpike is fixed and limited at so much for each section of said turnpike roads or parts of sec-

tions thereof, and fines are provided for violation of this portion of the Act.—Volume 3, Pollard's Code of Virginia, at bottom page 194, section 1294j (10).

Your petitioner owns, among other roads, three turnpike roads, spoken of in the record filed herewith, as Indian River Turnpike Road, Broad Creek Turnpike Road, and Norfolk and Princess Anne Turnpike Road, and certain sections or portions of these last named roads lie in Princess Anne County. While all of said roads belong to petitioner, yet they are entirely distinct and separate roads, the one from the other, and traverse different sections of Princess Anne County aforesaid.

Proceeding under the statute aforesaid, the Judge of the Circuit Court of Princess Anne County, on the 21st day of April, 1911, entered an order in vacation, appointing Thomas Edmunds, C. F. Hodgman and W. B. Frizzell as freeholders to examine and view those sections of the turnpike roads aforementioned in Princess Anne County, and specified by said order that said freeholders should meet on the 27th day of April, 1911, and inspect and view said sections of said turnpike roads in Princess Anne County, and make report thereof to the court.

It will be noted from the record that no separate order was made as to the respective sections of the several turnpike roads aforesaid, located in Princess Anne County, nor were different freeholders appointed for the different respective turnpike roads, or sections thereof, in said county; the order was a single order, embracing all the roads within the jurisdiction of the court, and named the same three persons as viewers of

all of said roads. No notice was given petitioner of said order, either before or after the time of its entry.

The persons named in the order filed a report in the Clerk's Office of Princess Anne County on the 8th day of May, 1911, in which, in substance, they reported that all the turnpike roads owned by plaintiff in error and located in Princess Anne County, and each section of said turnpike road located in said county, were not in good repair, and recommended that the tolls be suspended thereon.

From such report so filed, plaintiff in error, in accordance with the statute, appealed to the Circuit Court of Princess Anne County, in which court said appeal came on to be heard on the 12th day of December, 1911, and it was on the hearing of said appeal that the said petitioner made its first appearance, and had its first opportunity to make any objections to said proceedings whatsoever, except that it had noted its appeal from said report as a necessary and prerequisite step to procure any hearing by it thereon before the Circuit Court.

When such appeal was called for hearing in said Circuit Court, your petitioner made several motions in writing relative thereto as follows:

MOTION NO. 1.

By Motion No. 1, as will appear from the bill of exceptions No. 1 of the record, P. R., page 24, plaintiff in error moved that the whole of these proceedings be dismissed in toto on the ground that the statute under which they were being prosecuted and pending was and

is unconstitutional and invalid; because, among other reasons:

Said statute authorized the Court to enter a judgment by which, if the report of the viewers in said proceedings was confirmed, travel and passage by the public over the sections of the turnpike roads involved therein would be made free and without toll or any other compensation to plaintiff in error, and, therefore, said act authorized *the taking of the property of plaintiff in error for public use, without making any compensation therefor*, in violation of Section 1 of Article XIV of the Constitution of the United States providing that no State shall "deprive any person of life, liberty or property without due process of law," and that portion of Section 11 of Article I of the Constitution of Virginia providing "that no person shall be deprived of his property without due process of law."

Said Circuit Court of Princess Anne County promptly overruled said motion, and thereupon your plaintiff in error, without waiving the same, made its

MOTION NO. 2.

By Motion No. 2, as will appear from bill of exception No. 2 in the transcript of the record, P. R., page 25, plaintiff in error moved the Court that it enter no judgment in such proceedings confirming the report of the viewers of the road in such proceedings mentioned, because by any such judgment travel and passage by the public over each and every section of the turnpike roads therein involved would thereby be made free and without any compensation to your petitioner, and *that*

such judgment would operate and have the effect of depriving your petitioner of its property without due process of law, in violation of those portions of the Constitution of the United States and the Constitution of Virginia, hereinabove mentioned.

The Circuit Court of Princess Anne County promptly overruled this last motion of plaintiff in error, and thereupon plaintiff in error, without waiving its rights under its preceding motions, made its

MOTION NO. 3.

This motion, as will appear from bill of exception No. 3 in the transcript of the record, P. R., page 26, was made in writing, and a correct understanding of the same is of the utmost importance in the consideration of the questions presented by this case.

By this motion No. 3 plaintiff in error represented to the Circuit Court that it was the owner of the turnpike roads and sections thereof, relative to which the report of the viewers appointed in such proceedings was filed in the Clerk's Office on the 8th day of May, 1911, and from which said report plaintiff in error had appealed to the Circuit Court; that plaintiff in error had purchased said property and gone into the possession of the same on the first day of July, 1908, and had operated the same continuously from said date, and at no time since said date had any viewers appointed under the law of Virginia reported said sections of said turnpike roads, or said turnpike roads mentioned in said report as not in good repair, but had reported the contrary; that by the statute under which said proceedings were being prose-

cuted and were then pending in said Circuit Court, the tolls which plaintiff in error could and can charge for travel and passage of persons and things over said sections of said turnpike roads, and said turnpike roads in said report mentioned were fixed and limited, and provision made thereby for a fine for the violation of the said statute by the collection of tolls in excess of the amount fixed and limited thereby; that plaintiff in error had in the collection of tolls for such travel and passage over its turnpike roads, and especially over the turnpike roads and sections thereof mentioned in said report, conformed at all times to the tolls fixed and limited by said statute; that plaintiff in error, during the ownership of said turnpike roads and sections thereof, mentioned in said report, had expended in the operation and maintenance of the same, all the tolls and moneys ever received by it therefrom, directly or indirectly, with the exception of a small amount of money representing the proportion of yearly interest which said sections of said turnpike roads and said turnpike roads equitably had to bear of the yearly interest on a mortgage covering the said turnpike roads, and other turnpike roads belonging to plaintiff in error, which said proportion of yearly interest, borne by said turnpike roads and sections thereof involved in these proceedings, was very small and the amount did not equal interest at one-half per cent. per annum on the real value of said turnpike roads and sections thereof, or on the original purchase price paid therefor by plaintiff in error; that the expenditures that plaintiff in error had made, as aforesaid, in the operation and maintenance of said turnpike roads and sections thereof, mentioned in said report, had been

properly and judiciously made, and said expenditures had been made in a reasonable and unextravagant manner, and not in a wasteful or injudicious way; that since the 1st day of March, 1911, plaintiff in error had, in the operation and maintenance of said turnpike roads, and sections thereof, mentioned in said report, expended an amount of money much in excess of what it had received in any way, directly or indirectly, therefrom, and the said amount so expended by it had been expended judiciously and unextravagantly and properly, and that since said 1st of March, 1911, said turnpike roads and sections thereof involved in this proceedings had paid nothing towards interest on the mortgage by which it was covered, as hereinabove set out, although the interest on said mortgage had become payable since said date; that said turnpike roads, and sections thereof, involved in said proceedings, were kept and maintained in as good repair as possible with the revenue received therefrom, which revenue was and is limited, because of the fact that the tolls charged for passage of all classes of persons and things over same were fixed by the statute abovementioned, and by reason of such statute plaintiff in error could obtain no additional revenue from said turnpike roads, or sections thereof, by an increase in the tolls thereon; that although said turnpike roads and sections thereof involved in these proceedings, were of large value, and were purchased by plaintiff in error on the 1st day of March, 1908, at a reasonable price, yet plaintiff in error had never derived therefrom any income or any return on the purchase price paid therefor, or on the value thereof, but the same had proved by reason of the limitation of the toll

charges thereon by said statute, and the expenditures made in maintaining and operating the same, a losing investment to plaintiff in error; that any judgment rendered by said court in such proceedings, in view of the facts above set forth, or without considering said matters and hearing evidence relative thereto, and by which any such judgment, the collection of tolls on the turnpike roads or sections thereof, mentioned in these proceedings, would be suspended, would not only be unjust and inequitable, but would violate that portion of Section 1 of Article XIV of the Constitution of the United States, providing that no state shall "deprive any person of life, liberty or property without due process of law," and that portion of Section 11 of Article I of the Constitution of Virginia providing that "no person shall be deprived of property without due process of law," in that any such judgment would deprive plaintiff in error of its property without due process of law; and that additional expenditures on said turnpike roads and sections thereof, involved in these proceedings would not increase the passage and travel over the same, and the revenue derived therefrom would not be in any wise increased from that now derived therefrom. And said plaintiff in error, after alleging the facts above set forth, moved the said Circuit Court,

(a) That it be allowed to produce evidence before said Circuit Court to substantiate and prove the matters and facts hereinabove stated, and that said Circuit Court should hear and consider said evidence;

(b) That after hearing and considering the same, said Circuit Court should refuse to confirm the report of the viewers therein, and dismiss said proceedings;

(c) That should said Circuit Court refuse to hear and consider said evidence, said Circuit Court should enter no judgment herein, by which tolls would be suspended on the turnpike roads, or sections thereof, involved in the proceedings, or any other judgment than a judgment refusing to consider said report of said viewers.

The Court, however, promptly overruled such motion, in every respect, refused to allow the production of evidence to substantiate and prove the matters and representations contained in such motion, and refused to hear or consider the same in any way.

II.

In the record in this case, beginning on page 8 of the Printed Record, and ending on P. 14 thereof, under the headings "A," "B," "C," plaintiff in error has already made its brief upon the questions now before this Court. It now, therefore, respectfully refers the Court to said record for said argument without repeating the same herein and will only add thereto herein such matter as it deems material.

Motions Nos. 1 and 2, hereinabove mentioned, may be treated together, provided the distinction between the two is kept in mind. Motion No. 1 is based upon the contention that the statute is unconstitutional, because it *authorizes* a judgment, which, if entered, would deprive plaintiff in error of its property without due process of law. Motion No. 2 is based on the fact that the judgment, as entered, deprives plaintiff in error of its property without due process of law, within the de-

cision of this Court in Chicago & Burlington, &c., Railroad vs. Chicago, 166 U. S. 226. On these two motions, to the argument already hereinabove referred to, it is simply desired to add the following quotation from Salt Creek Turnpike Company vs. Parks (Ohio) 35 N. E. 304:

> "But while the right to demand and receive toll cannot be extinguished without a finding by jury trial that the turnpike has been so out of repair, within the statutory meaning, as properly to be deemed and held abandoned it is urged that, in addition to the franchise to collect toll, the plaintiff in error also owns the road, its bridges and culverts, the very gravel on the road, etc.; and it is claimed in the record, though not in the brief of counsel, that to declare the turnpike a free road, and subject its other property to the free use of the public without the consent or reimbursement of the company, would be to take private property for public use without first making compensation therefor in money, and hence in violation of section 19 of article 1 of the Constitution. When it is found expedient to convert a toll road into a free road, a mode is prescribed by statute whereby county commissioners may purchase the toll road at a price not exceeding the statutory appraisal and pay the company in money, or in bonds to be issued as specified in the statutes. Section 3498a, Rev. St. et seq. It becomes, therefore, a question for consideration, how far if the franchise to collect toll may be extinguished after a jury trial, the other

property of the turnpike company may be subjected to the free use of the traveling public without compensation therefor to the owners. But that question, with the sufficiency of facts disclosed in the record, we cannot satisfactorily consider in the case at bar. With the views herein expressed, we are of opinion that the judgments of the circuit court, court of common pleas, and probate court should be reversed, and the petition in the probate court dismissed for want of jurisdiction in that court."

As to Motion No. 3, the case of Turnpike Company vs. The State, 3 Wall. 210, relied upon by the defendant in error is not in point. In that case the Turnpike Company claimed that under its charter it had an exclusive contract right that had been impaired by a subsequent act of the legislature incorporating a railroad company which ran near and parallel to the turnpike road and that thereby its income had been greatly reduced and it had become impracticable for the Turnpike Company to maintain and keep its turnpike road in any better order and repair that it was in. This Court held that the Turnpike Company had no exclusive contract right which had been impaired and this was the case decided, but Mr. Justice Nelson does go on to say by way of a dictum that the remedy of the Turnpike Company even if it had a contract right was "in restraining by the proper proceedings the railroad company from constructing their road. The breach of the contract on the part of the State furnished no excuse for the turnpike company in disregarding their part of it which was a burden, to-wit, the repairs, while at the same time

insisting upon the part beneficial, to-wit, the collection of the tolls." Taking this dictum at its face value and still that case is distinguishable from the case at bar: The Court there was dealing with a private charter which the Turnpike Company claimed impaired its contract rights. There was no general law of the state, as in the instant case, absolutely limiting the right of the Turnpike Company in the tolls it should collect. There was no statute, such as we have here acting directly on the tolls to be received by the Turnpike Company. The injury to it there was incidental and indirect and, if any at all, arose from the grant of a private charter. Here we have a statute acting directly upon the income of the plaintiff in error and meant for the very purpose of limiting its income. The remedy there was plain by way of injunction against the newly incorporated railroad company and to such a remedy the state would not be a party and in it was not interested. The State there was making no direct attempt to shut off the income of the Turnpike Company by a law which was to be enforced by a public prosecution in its name. The contrary is true here. The State here has by a general law, which is a part of the very statute under which the suspension of the collection of tolls is sought, limited the income of these turnpike roads on the one hand and on the other hand by these proceedings, attempts to punish the plaintiff in error for complying with the provisions relative to tolls by a total suspension of the right to collect tolls; in other words, its position is that plaintiff in error must comply with both sections of the statute although the result may be absolute ruin. Then again what remedy does plaintiff

in error have against that portion of the statute relative to the rates of toll to be charged? Is it to sue the state? And if injunction is the proper remedy against the enforcement of the statute, who should be enjoined? The section of the statute fixing the rates provides that for a violation thereof the Turnpike Company shall be fined by a justice of the peace not less than $10.00 nor more than $50.00. The justice of the peace cannot be enjoined, he being a judicial officer, and there is no person representing the state against whom relief can be had. Any individual can prosecute, and to enjoin each individual would lead to interminable litigation at great expense. Plaintiff in error is obliged to comply with the rate sections of the statute because really no practicable remedy exists. Is the state to be allowed to further punish it by totally depriving it of its property because by complying with one section of a statute it is *ex necessitate rei* compelled to violate another section thereof?

Again in Turnpike Company vs. The State supra, the State did nothing, even admitting the contention of the Turnpike Company, except break its contract with the latter; it did not undertake to break the contract and at the same time enact a general law forbidding the Company any remedy for such breach on the State's part. Here a general law fixes the tolls and provides fines for charges beyond those fixed and at the same time requires expenditures beyond possible receipts and when the question arises as to its right to do this assumes the position that you should break one section of a statute, for which you will be fined, in order to carry out another section of the same statute. This is

a very different question from that in Turnpike Company vs. The State supra.

Aside from this, it has time and again been recognized that while financial inability is no defense to a *quo warranto* proceedings on account of non-user of franchise, it is a defense to other proceedings short of that—City of Benton Harbor vs. St. Joseph (Mich.) 60 N. W. 758. If this is true as to ordinary financial inability, it is *a fortiori* true when the financial inability is produced by an act of the State itself.

For the above reasons it is submitted that the motion to dismiss or affirm should be overruled.

Respectfully,

NATHANIEL T. GREEN,

Counsel for the Norfolk & Suburban Turnpike Co.

13

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 962.

THE NORFOLK AND SUBURBAN TURNPIKE COMPANY, PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

MOTIONS TO DISMISS OR AFFIRM, WITH NOTICE AND STATEMENT OF GROUNDS OF MOTION, WITH BRIEF FOR DEFENDANT IN ERROR IN SUPPORT OF MOTIONS.

SAM'L. W. WILLIAMS,
Attorney General of Virginia.
J. D. HANK,
For Defendant in Error.

INDEX.

Page

Motion to Dismiss or Affirm..... 1

Notice 2

Affidavit of Service 3

Statement of Case..... 4

Grounds of Motion to Dismiss..... 12

Commonwealth of Virginia is Not a Proper Party..... 12

This Honorable Court is Without Jurisdiction..... 13

The Federal Question Raised in this Case is Manifestly Devoid of Merit..... 14

Grounds of Motion to Affirm..... 18

The Writ of Error Was Resorted to for Delay Only..... 19

The Third Assignment of Error Alone Remains to be Considered 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 962.

THE NORFOLK AND SUBURBAN TURNPIKE COMPANY, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

In error to the Supreme Court of Appeals of the State of Virginia.

MOTION TO DISMISS OR AFFIRM.

Comes the defendant in error and moves this Honorable Court to dismiss the said writ of error because this Court has no jurisdiction, or to affirm the decisions, judgments, and orders complained of, it being manifest that even if this Court has jurisdiction the said appeal was taken for delay only, and the questions on which jurisdiction depends are so frivolous as not to need further argument.

SAM'L W. WILLIAMS,
Atty. Genl. of Vir. For the Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

THE NORFOLK AND SUBURBAN TURNPIKE COMPANY,
PLAINTIFF IN ERROR,
v.
THE COMMONWEALTH OF VIRGINIA,
DEFENDANT IN ERROR.

No 962.

In error to the Supreme Court of Appeals of the State of Virginia.

NOTICE.

TO NATHANIEL T. GREEN,
Attorney for Plaintiff in Error
in the Above Entitled Case:

You are hereby notified that the defendant in error in the above entitled case will on Monday, the 8th day of April, 1912, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motions to dismiss or affirm and the grounds of said motions, and the brief of the argument thereon, both of which are hereto attached.

SAM'L W. WILLIAMS
Atty. Gen. of Vir. For Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 962.

THE NORFOLK AND SUBURBAN TURNPIKE COMPANY, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

In error to the Supreme Court of Appeals of the State of Virginia.

AFFIDAVIT OF SERVICE.

Before me, H. G. Avery, a Notary Public in and for the Corporation of the City of Norfolk, in the State of Virginia, this day personally appeared J. D. Hank, who, being by me duly sworn, deposes and says that on this day he deposited in the United States mail in the City of Norfolk, Virginia, with postage prepaid, true copies of the attached motions, notice and brief of argument of the defendant in error, addressed to Nathaniel T. Green, Citizens Bank Building, Norfolk, Virginia, counsel of record of the above named plaintiff in error, and that the said deposit in the mail was made at such time as to reach the said Nathaniel T. Green, by due course of mail, three weeks before the 8th day of April, 1912. My term of office expires February 17th, 1914.

J. D. HANK.

Sworn to and subscribed before me this, the 15th day of March, 1912.

H. G. AVERY,
Notary Public.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 962.

THE NORFOLK AND SUBURBAN TURNPIKE COMPANY, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

In error to the Supreme Court of Appeals of the State of Virginia.

GROUNDS OF MOTIONS TO DISMISS OR AFFIRM WRIT OF ERROR, AND BRIEF FOR DEFENDANT IN ERROR ON SAID MOTIONS.

STATEMENT OF CASE.

This case comes up on a writ of error from this Honorable Court allowed by the President of the Supreme Court of Appeals of Virginia, from the final decision and judgment of that Court in refusing a writ of error and appeal to the final judgment and order of the Circuit Court of Princess Anne County, ordering that all tolls upon certain turnpike roads owned by the plaintiff in error, be suspended until the

roads were put in proper repair. (Record pp. 36, 37, 23).

The laws of the State of Virginia provide ofr the examination of each turnpike road in the State three times a year, and further provide, if such road is found "not to be in good repair," a remedy to compel the owner thereof to put the same in good repair.

The plaintiff in error owns certain turnpikes lying in Princess Anne County, and these proceedings originated in the Circuit Court of that county for the purpose of having these roads examined, and, the roads having been found out of repair, the Circuit Court applied the remedy provided by law to compel a repair of the roads. The sole question involved is **whether the State of Virginia can compel a turnpike company to put its road in proper repair.** (Record pp. 20, 21, 22, 23, 24).

These proceedings originated in compliance with Chapter **X** of "An Act concerning Public Service Corporations," and are contained in Acts of Assembly of Virginia (Extra Session) 1902-3-4, p. 968, 1007 to 1009, save sections 7 and 9, which were amended in 1906, and are contained in Acts of Assembly of Virginia, 1906, p. 523-525. The provisions of these statutes, so far as they are necessary to the decision of the case under review, are as follows:

> "§5. Any person or persons alleging that a turnpike road, or any section thereof, is out of repair, may apply by petition in writing to the circuit court of any county, or to the judge thereof in vacation, in which said road may lie, for a summons to three freeholders not living on said road to meet on said section at a day specified and examine the same; five days' notice of such application to be given to the president or one of the directors of said company; or, if it be a State road, to the superintendent thereof, and the said court shall forthwith appoint such viewers of said road, if, upon the hearing of said petition, the same shall appear reasonable and

proper; and it shall be the duty of the judge of the circuit court of any county in which there may be a turnpike road upon which tolls are charged, three times a year, in term or vacation, in the months of April, August, and December, to appoint three such viewers for each of such turnpike roads in his county, who shall, at a time to be specified in the order, examine the same, and shall be paid for their services by the company. All proceedings under said appointment of the court shall be as provided by sections six, seven, eight, and nine of this chapter; except that in the case of any turnpike road in which the State has an interest a copy of the report of the viewers, if against the road, shall be certified by them to the State corporation commission, and the facts certified by them to the court, and the cost thereof shall be paid as the court may direct; and except, also, that on such last-mentioned report, and on any report made by viewers under this section, if made against the turnpike company, of which report the turnpike company shall be forthwith notified by the clerk of the court, the said company may appeal to said circuit court, and said court may, on such appeal, confirm, set aside, or recommit said report for further proceedings, as it may deem advisable.

"§6. The said freeholders shall meet pursuant to the summons, and take an oath faithfully to perform their duty, and make a report of the condition of the said section to said court.

"§7. The report of the freeholders shall be annexed to the summons and shall be to the following effect:

We, ————, freeholders named in the summons hereto annexed, certify that after having been duly sworn, we have in pursuance thereto examined the section herein mentioned and report the condition of the same to be as follows: ———— and make the following recommendations:

"§8. The report shall be forthwith returned to the clerk's office of the circuit court, to be there preserved and recorded. The fees for such record, and for

summoning the freeholders, shall be paid by the company, where the decision is against it, otherwise by the informer.

"§9. All tolls upon any section or sections of the road of any turnpike company pronounced to be out of repair by the viewers, and over which they recommend that the tolls be suspended, shall from the time of the filing of the report of the viewers in the clerk's office, be suspended, unless an appeal be taken from the decision of the said viewers as provided in section five of this act: and in the event that the circuit court shall confirm the said report of viewers, upon appeal, or in the event that no appeal be taken, the tolls thus suspended shall remain suspended until said section or sections shall be put in good repair and ascertained so to be as follows:

On the application of the president, or one of the directors of the company, a justice shall issue his warrant for summoning three freeholders of the county not living on or regularly using said road, to be named in the warrants, to meet on said section at a certain specified time, which shall be as soon as convenient, and ascertain whether the said section is in good repair or not; and the proceedings upon such warrants shall be the same as are prescribed in the preceding sections; the fees of the officers and viewers shall be paid by the company: provided, that where viewers, appointed by the circuit court of any county in which there may be a turnpike road upon which tolls are charged, or by the judge thereof in vacation, shall have reported such turnpike, or any section or sections thereof as not in good repair, and payment of tolls on the same shall have been suspended in the manner provided by law, should such turnpike company allow its said road, or any section or sections thereof, to remain for four months consecutively in such condition that tolls are not allowed to be charged thereon, the Commonwealth's Attorney of such county, or of any adjacent county, may apply by petition in writing to the circuit court of such county in which such turnpike road is situated to have the said turnpike, or any section

or sections thereof in said county upon which tolls are not allowed to be charged, again viewed by freeholders, of which petition five days' notice in writing shall be given to the president, or one of the directors or any agent or employee of the said turnpike company; and the said circuit court shall cause the said turnpike, or any section or sections thereof in said county upon which tolls are not allowed to be charged, to be examined by three freeholders of the county not living on or regularly using said road, as prayed in said petition; all proceedings following said petition to be as provided by sections five, six, seven, and eight of this chapter; provided, that the report of the said freeholders shall, in addition to the report required by section seven, of this chapter, state whether in their opinion the said turnpike company has prior to service of such notice made substantial effort to put in good repair such section or sections of this road since the same was or were declared as not in good repair and tolls thereon suspended.

Upon the filing of the report of the said viewers, the said court may set a day for the consideration of the said report, of which due notice in writing shall be served upon the president, or any director or agent or employee of the said turnpike company, and upon said hearing, the said court may confirm, set aside, or recommit said report for further proceeding, or may enter such order in the premises as it may deem advisable; but, if upon hearing herein provided for, or any subsequent hearing, the said court shall be of the opinion that the said road, or any section or sections thereof, is or are not in good repair, and that the said turnpike company has not made real and substantial effort to put the said road and the sections thereof in good repair, after tolls were suspended thereon, according to this section, then the said court may enter its order declaring that the said turnpike company has abandoned its said road in said county, and thereupon the charter and franchises of the said turnpike company as to said road in said county shall be forfeited. Any turnpike company whose charter

and franchises have been declared forfeited as to said county by said order may appeal from the decision of the said court to the supreme court of appeals.

"10. When different rates are not prescribed by law, the following tolls may be received on a section of five miles of a turnpike which has been completed, to-wit: Six and a quarter cents for twenty sheep or hogs, and twelve and a half cents for twenty cattle, and so in proportion, for a less or greater number; three cents for a horse, mare, mule, or gelding; five cents for a two-wheeled riding carriage; ten cents for a four-wheeled riding carriage; and for a cart or wagon, six and a quarter cents for each animal drawing it; and for every engine, machine, wagon, or other vehicle, moved or drawn, in whole or in part, by steam or other motive power, six and a quarter cents for each wheel of every such engine, machine, wagon, or other vehicle moving on the ground. For a fractional part of a section, tolls may be received, bearing the same proportion to the tolls for a full section that the said fractional part bears to such full section; provided, however, that the following rates of tolls shall be charged on the Valley turnpike, to-wit: Five cents for twenty sheep or hogs, and ten cents for twenty cattle, and so in proportion for a greater or less number; three cents for a horse, mare, mule, or gelding; five cents for a two-wheeled riding carriage; ten cents for a four-wheeled riding carriage, drawn by two horses; six cents for a four-wheeled riding carriage drawn by one horse; and for a cart or wagon drawn by one horse, five cents; for a wagon drawn by two horses, ten cents; for a wagon drawn by four horses, eighteen cents; and for every additional horse, three cents; and for every engine, machine, wagon, or other vehicle moved or drawn, in whole or in part, by steam or other motive power, six and a quarter cents for each wheel of every such engine, machine, wagon, or other vehicle moving on the ground. For a fractional part of a section only such tolls may be received as bear the same proportion to tolls for a full section that the said fractional part bears to

such full section; and provided, further, that the present system of giving annual tolls for travel to residents along the Valley turnpike shall be continued, and no greater charge shall be made than is now charged by turnpike companies for similar travel."

It is proper to add that section 1 of chapter 1 of "An Act concerning Public Service Corporations," Acts of Assembly of Virginia (Extra Session) 1902-3-4, p. 968, provides as follows:

> "1. Be it enacted by the General Assembly of Virginia, as follows: As used in this act, the words "public service corporation," or "public service corporations," shall include transportation and transmission companies; turnpike and other internal improvement companies, and gas, pipe line, electric light, heat, power and water supply companies, and all persons, firms, partnerships, associations, or corporations authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public, and shall exclude all municipal corporations and public institutions owned or controlled by the State."

On April 21st, 1911, in accordance with section 5 above set out, the Judge of the Circuit Court of Princess Anne County appointed viewers to examine the turnpikes in that County, and report their condition (Record p. 210), which report was filed May 8, 1911, and stated that the roads were "practically worn out and out of repair," and recommended that the tolls be suspended until they were put in good repair. (Record pp. 20, 21, 22).

The plaintiff in error appealed from this report to the Circuit Court of Princess Anne County (Record p. 23), and, on the hearing of the appeal, the plaintiff in error made numerous motions, which were all overruled, and an order

entered suspending tolls of these roads until they were put in proper repair, but this order was suspended, pending action by the Supreme Court of Appeals of Virginia (Record pp. 23, 24).

A petition for an appeal and writ of error to this order was filed in the Supreme Court of Appeals (Record pp. 1-20), and this petition was rejected by this Court on January 11th, 1912, on the grounds that the order of the Circuit Court of Princess Anne County was **plainly right** (Record p. 33); and from this order, a writ of error and supersedeas was, on January 13th, 1912, allowed to this Honorable Court. (Record pp. 36, 37).

Many assignments of error were relied on in the Supreme Court of Appeals of Virginia (Record pp. 8-19), and passed upon by that Court adversely to the contention of the plaintiff in error (Record p. 33); but only three of these assignments raised any Federal question, and, therefore, under the decisions of this Court, which are too numerous and familiar to require citation, only these three assignments remain open for consideration and review, namely:

1. That, the statute under which the proceedings were instituted is unconstitutional because it violated that portion of Section 1, Article **XIV** of the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law.

2. That, by entering judgment under this statute, there was violated the first section of Article **XIV** of the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law.

3. That, by the refusal of the Court to allow the plaintiff in error to produce evidence of the income from the turnpikes and the amount expended upon them, the plaintiff in error is deprived of its property without due process of law in vio-

lation of Section 1 of Article **XIV** of the Constitution of he United States. (Record p. 35).

First: GROUNDS OF MOTION TO DISMISS.

1. COMMONWEALTH OF VIRGINIA IS NOT A PROPER PARTY.

On the threshold, the attention of the Court is called to the fact that the record complained of fails to disclose that any parties were made to the proceeding, and that in the acceptance of the writ in this case the Attorney General of Virginia made a qualified acceptance as follows:

Richmond, Virginia, January 13, 1912.

"I, Saml. W. Williams, Attorney General of the State of Virginia, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States without admitting that the Commonwealth of Virginia is proper party and reserving all rights.

"SAML. W. WILLIAMS,
"Commonwealth's Attorney of
Princess Anne County." (Record p. 39).

Note: The words "Commonwealth's Attorney of Princess Anne County" were inadvertently put in. They should have been "Attorney General of Virginia."

The Commonwealth of Virginia enters a qualified appearance in this case and moves the Court to dismiss this appeal on the ground that the appeal was improvidently awarded in this, that the Commonwealth of Virginia has nowhere in the proceedings been made a party, and is not now a proper party in this case; and without waiving this objec-

tion, but insisting thereon, the Commonwealth of Virginia by her Attorney General, submits the following motions to dismiss or affirm for the consideration of the Court.

2. THIS HONORABLE COURT IS WITHOUT JURISDICTION.

It is a well established principle that, though it appears from the records that a Federal question is averred, if such question be obviously frivolous or plainly unsubstantial, because it is devoid of merit, a writ of error awarded from a court of last resort of a State to this Honorable Court, will be dismissed for want of jurisdiction. Harris Distilling Co. vs. Mayor and City Council of Baltimore, 216 U. S. 285, 288.

In that case, as in this, a writ of error was directly from the court of last resort of the State and was prosecuted upon the assumption that questions under the Constitution of the United States were involved, which gave a right to immediately resort to the Supreme Court of the United States for their solution, and Mr. Justice White, in delivering the opinion of the Court, said (p. 288):

> "Thereupon a writ of error directly from this court was prosecuted upon the assumption that questions under the Constitution of the United States were involved which gave a right to an immediate resort to this court for their solution. Upon the correctness of such assumption our jurisdiction depends. The assumption, however, may not be indulged in simply because it appears from the record that a Federal question was averred, if such question be obviously frivolous or plainly unsubstantial, either because it is manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. Leonard v. Vicksburg, S. & P. R. Co., 198 U. S. 416, 421, and cases

cited; Delmar Jockey Club v. Missouri, 210 U. S. 324, 335; McGilvra v. Ross, 215 U. S. 70."

An examination of the assignments of error relied on in this Honorable Court (Record pp. 34, 35, 36), shows that though stated under several heads, they are confined to the charge that the statute and proceedings in question are unconstitutional in that the plaintiff in error is deprived of its property without due process of law in violation of section 1, Article **XIV** of the Constitution of the United States.

THE FEDERAL QUESTION RAISED IN THIS CASE IS MANIFESTLY DEVOID OF MERIT.

The plaintiff in error, on July 1, 1908, purchased the turnpikes in question, and took possession of them and have been operating them from that time. (Record p. 4). When the purchase was made and the possession secured, the statute under review, and above printed, was in force. Indeed, this statute has been a law in Virginia, with little change, since February 7, 1817 (2 Revised Code of Laws of Virginia, pp. 219-223). The plaintiff in error, therefore, purchased, took charge of and began the operation of these roads with full knowledge of the rate of tolls it could charge and with full knowledge of the fact that the tolls would be suspended whenever the roads were allowed to get out of repair.

Mr. Justice Harlan, in delivering the opinion of the Court in Covington and Lexington Turnpike Road Company v. Sandford, 164 U. S. 578, said (page 594):

> "Turnpike roads established by a corporation, under authority of law, are public highways, and the right to exact tolls from those using them comes from the State creating the corporation. California v. Central Pacific Railroad, 127 U. S. 1, 40."

When the plaintiff in error secured from the State the right to operate these roads and collect tolls, that right carried with it the obligation to comply with the laws of the State regulating and controlling turnpike companies. In accepting the benefits granted by the State, the conditions and burdens attendant thereupon had to be assumed. Yet, within three years, the plaintiff in error comes before this Honorable Court claiming that it has secured a valuable property right from the State of Virginia and prays this Court to protect that right and, at the same time, to relieve it of the obligations which it assumed when it secured that right. It proclaims to this Court that it has failed to perform its obligations to the State; that it has disregarded the rights of the public, and asks this Court to uphold it in its wrong, and allow it to enjoy the valuable rights which it has secured, and allow it to ignore its obligations to the public. The Turnpike company should surely come to this Honorable Court with clean hands.

The plaintiff in error has no right to demand that its franchises be protected, indeed, has no right to even enjoy its franchises, and, at the same time, act in utter disregard of its obligations to the public. Not even a turnpike company has the vested right to do a wrong. Even independently of the statute in review, the State has a right to forfeit the charter of the turnpike company for flagrant abuse of its privileges, and, surely, it has a right to enforce a remedy less harsh. The object of the statute is not to **take property**, but to enforce the discharge of a public duty; not to infringe upon a private right but to redress a public wrong. Davis v. Vernon Shell-Road Co. (Ga.) 29 S. E. 475, 476. In this case, the Court said (p. 475):

> "Under the original charter granted to the defendant in error in this case (Acts 1859, p. 340), power was

given it to build a shell road, to be constructed and laid over a public highway in this State, and 'to erect toll gates across the same, and charge toll for the use of said road, and for passing over the same.' It is insisted by counsel for the defendant in error that this constituted a contract between the state, on the one side, and this defendant company, upon the other. If so, manifestly there must have been some consideration moving each party to enter into the compact. The consideration actuating the company was the profits growing out of the high and important franchise requiring all travelers to pay for passage over this public highway. Obviously, the consideration, on the other hand, was that the road bed should be by the company kept in safe and suitable condition for public travel. Though there seem to be no express terms in the charter placing such an obligation upon the company, yet it is manifestly implied. Such franchises are never granted for the good and profit of a corporation alone, but the state also looks to the welfare of the public. To put it in the power of a private company to control a highway of this sort, and at the same time not to impose upon it the obligation to have regard for the public safety and convenience in the matter of keeping its roadbed in repair, could not have been within the legislative intent. Elliott, Roads & S. p. 59 et seq. For a violation of this obligation, as we have heretofore seen, the legislature has a right to prescribe a remedy."

In this Georgia case, it was held that a statute enacted after the turnpike company secured its charter providing a remedy against the company for failure to keep its roads in repair, did not impair the obligation of contract and that the turnpike company was subject to its provisions.

The State of Virginia, by the statute above quoted, it is submitted, has placed upon the plaintiff in error the burden of keeping its roads in repair **as a condition precedent to the right to collect tolls,** and when the plaintiff in error failed to conform to the condition, its right to collect tolls ceased, and

the proceedings in question in this case are not for the purpose of taking away any property right of the turnpike company, but to prevent the company from exercising a right which it does not own. When the road is out of repair, **ipso facto**, the right to collect tolls ceases.

The United States Supreme Court has recognized the principle of law that a turnpike company has no right to collect tolls when its road is out of repair.

In Turnpike Co. vs. State (U. S.) 3 Wall. 210, as a defence to a scire facias to forfeit the charter of a turnpike company because it demanded tolls though it had not kept its road in repair, the company set up that the legislature had granted a railroad company the right to build a railroad alongside of the turnpike, and that the railroad had deprived the turnpike of so much revenue as to make it impractical for the turnpike company, from the income received from travel over its road, to keep the same in better repair than it had done.

The court, through Mr. Justice Nelson, said (p. 214):

> "The remedy was not in neglecting to repair the road, and at the same time collect the tolls. It was in restraining, by the proper proceedings, the railroad company from constructing their road. The breach of the contract on the part of the State furnished no excuse for the turnpike company in disregarding their part of it which was a burden, to-wit, the repairs, while, at the same time, insisting upon the observance of the part beneficial, to-wit, the collection of tolls."

Therefore, the defendant in error contends that the order entered by the Circuit Court of Princess Anne County forbidding the turnpike company to collect further tolls on the turnpikes in question, until the same had been put in proper repair, was not a taking of its property, but simply a means of

compelling the company to perform the duty which it owes to the public, before reaping the benefit which the state allows it.

The proceedings under review do not make the roads public roads, nor take them from the plaintiff in error, but simply suspend the tolls thereon until the turnpike company has performed its duty, performed its part of the contract with the State, fulfilled the condition precedent to the right to collect tolls, namely, put its roads in repair. For these reasons, the defendant in error submits that the Federal question raised is manifestly devoid of merit and, therefore, the writ of error should be dismissed for want of jurisdiction.

Second: GROUNDS OF MOTION TO AFFIRM.

ALTHOUGH THIS HONORABLE COURT HAS JURISDICTION, THE ORDERS AND JUDGMENTS OF THE COURTS OF VIRGINIA SHOULD BE AFFIRMED BECAUSE IT IS MANIFEST THAT THE WRIT OF ERROR WAS TAKEN FOR DELAY ONLY, OR THE QUESTIONS ON WHICH THE DECISION OF THE CASE DEPENDS ARE SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT.

Though this case be not a proper case to dismiss for want of jurisdiction, at the same time, it is a proper case for the affirmance of the judgment of the court below.

In Louisville & Nashville R. R. v. Melton, 218 U. S. 36, Mr. Justice White, who delivered the opinion of the Court, said (page 49):

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and,

therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous."

The first syllabus of this case is as follows:

> "When a Federal question does exist the writ of error will not be dismissed as frivolous or as foreclosed by former decisions when analysis of those decisions is necessary, where there has been division of opinion in the court below, as in this case, and conflict of opinion in prior decisions as to the point involved."

The converse of this proposition is true, namely, that where it appears that the appeal is taken for delay, or that, though an analysis of familiar decisions be necessary, yet where that shows that the decisions are practically unanimous upon the issue presented, the court will affirm the judgment of the court below as plainly right.

THE WRIT OF ERROR WAS RESORTED TO FOR DELAY ONLY.

This case first came up in the Circuit Court of Princess Anne County on April 21, 1911 (Record p. 20), and the report of the viewers finding the roads out of repair and recommending that the tolls be suspended, was filed May 8, 1911 (Record p. 20), to which report an appeal was immediately noted. (Record p. 23). By the notation of this appeal, the plaintiff in error prevented the suspension of tolls, as the statute provides that, when an appeal is taken, the tolls shall

not be suspended until the confirmation of the report by the Circuit Court.

Before this appeal could be tried, the plaintiff in error applied to the Supreme Court of Appeals of Virginia, for a writ of prohibition against similar proceedings in the County of Norfolk, on the ground that the statute was unconstitutional because, among other reasons, it violated Article **XIV** of the Constitution of the United States (Record p. 8). This writ having been denied, the appeal in this cause came on to be heard December 12th, 1911, and upon confirmation of the report of the viewers by the Circuit Court, the plaintiff in error still prevented a suspension of the tolls by presenting to the Supreme Court of Appeals of Virginia a petition for writ of error in which the question of the constitutionality of the statute was a second time presented to this Court (Record pp. 1, 3, 4, 5, 8), and that Court having **again** declared the statute constitutional (Record p. 33), the plaintiff in error prevented the suspension of tolls by obtaining a writ of error and supersedas to this Honorable Court. (Record pp. 36, 37.)

After the filing of the record in the Clerk's Office of this Honorable Court, the defendant in error had the record printed, so that this motion might be submitted.

Prior to 1906, the law provided that all tolls upon any section of the road of any turnpike company pronounced not to be in good repair, should be suspended **from the time of the filing of the report of the viewers in the Clerk's Office,** until the said section was put in good repair (Acts of Assembly of Virginia, 1902-3-4, p. 1008); but, in 1906, the law was so changed that, as it now stands, the tolls are not suspended until the report is confirmed by the Circuit Court, provided the turnpike company appeals from the report. (Section 9 of statute set out herein).

Thus it appears that, though the roads were, on April 29, 1911, found to be worn out and pronounced to be out of re-

pair (Record p. 22), yet, by reason of defenses made by the plaintiff in error to three different tribunals (and to one of them twice), the turnpike company has successfully prevented the suspension of tolls on these highways, and has thwarted the State in the endeavor to compel it to perform its duty.

It is evident from the report of viewers that these roads have not received proper attention from their owners, and that, as a result thereof, the roads are badly out of repair and practically worn out (Record p. 22), yet by means of these proceedings, the plaintiff in error is enabled still to collect tolls and in no way is it affected to its injury by its failure to perform the duty which it owes to the public, and until this Honorable Court determines the questions presented in this cause, it is impossible to compel the plaintiff in error to put its roads in repair, and the plaintiff in error continues to collect tolls, and continues to reap all the benefits which it would have a right to reap if the roads had been kept in proper repair.

The turnpikes in question are the only means by which the people of Princess Anne County can reach the City of Norfolk (Record pp. 18, 32), and yet, though the roads are out of repair, worn out, practically impassable, the plaintiff in error, in flagrant violation of the duty which it owes the public, negligently allows these highways to become almost impassable; and, with an utter disregard for the rights of the public, when proceedings are brought by the only method possible under the laws of Virginia to compel the plaintiff in error to perform its duty, it refuses so to do and prevents the enforcement of its duty to the public by appeal upon appeal, though all the time, it continues to reap all the benefits which were granted it by the State, to-wit, the collection of tolls over a public highway. It is a small wonder that at times the people should take the law in their own hands where there is such an utter disregard for the rights of the public.

The Counsel appearing in this Honorable Court for the plaintiff in error, presented the petition for the writ of prohibition hereinbefore mentioned, to the Supreme Court of Appeals of Virginia, and the position that the writ of error to this Court was taken for delay only, gains peculiar force when it is noted that, in his argument to sustain the petition for the writ of prohibition on the ground that the statute violated Article **XIV** of the Constitution of the United States, Counsel said (p. 17 of his brief):

> "It is to be noted that we do not contend that a company may not be punished for the non-repair of its roads by the cutting off of tolls temporarily."

2. IT IS MANIFEST, FROM THE UNANIMITY OF THE DECISIONS OF THE COURTS ON THE QUESTION RAISED IN THIS CASE AND BY AN APPLICATION OF THE PRINCIPLES SETTLED BY THE CASES WHICH HAVE ALREADY BEEN DECIDED, THAT THE CONTENTIONS NOW ADVANCED ARE WHOLLY WITHOUT MERIT, AND, THEREFORE, DO NOT NEED FURTHER ARGUMENT.

Statutes similar to the statute in question exist in practically every state of the union, and these statutes have, since the ratification of Article **XIV** of the Constitution of the United States, been, from time to time, reviewed by the courts of last resort of the various States of the union, but, their constitutionality has never been questioned as violating Article **XIV**, save in a few cases to be hereinafter considered.

Without attempting to cite all these cases, reference is made to the following in which such statutes were under consideration, and no intimation was advanced that the statute in any way violated Article **XIV** of the Constitution of the United States.

New York—Suydam v. Smith, 52 N. Y. 383; People v. Martin, 56 How. Prac. 516.

New Jersey—State v. Trenton, etc. Turnpike Company, 34 N. J. Law (5 Vroom) 182; Moorestown etc. Turnpike Co. v. Holmon, 63 N. J. Law 519, 43 Atl. 445; Tinton Falls Turnpike Co. v. Hance, 64 N. J. Law 480, 45 Atl. 772; Shiloh Turnpike Co. v. Bates (N. J.) 76 Atl. 448

Pennsylvania—Sammons v. B. & S. Turnpike Co. (Pa.) 10 Phila. 111.

Kentucky—King v. Labenon etc. Turnpike Co. (Ky. 1895), 30 S. W. 619.

Michigan—People v. Grand Rapids etc. Plank Road Co, 67 Mich. 5, 34 N. W. 250.

Maryland—Williamsport etc. Turnpike Co. v. Startzman, 86 Md. 363, 38 Atl. 777.

Georgia—Davis v. Vernon Shell-Road Co., 163 Ga. 491, 29 S. E. 475.

The statute under review has been in force since 1817 (2 R. C. 219), with little change————and such changes as were made enured to the benefit of turnpike owners————and yet its constitutionality has never been heretofore questioned in Virginia.

In Pillow vs. Southwest, etc. Imp. Co. 92 Va. 144, the Court, commenting upon the force of the fact that a statute had been in force for a long number of years without objection being raised to its constitutionality, said (page 149):

> "The statute in question was in the Code of 1849. Since then the people of the State have adopted the Con-

stitution of 1851 and the present Constitution, and, it must be presumed, with full knowledge of such statute, and with the further knowledge that with that statute in force a trial by jury in such cases could only be had when a court of equity in its discretion desired it, and not as a matter of right. The constitutionality of the statute, as well as its wisdom, seems to have been concurred in by the profession, as, during the long period it has been in force—now nearly fifty years—**its constitutionality has never, so far as we know, been heretofore questioned in this court.** The statute is, in our opinion, clearly constitutional." (Black print ours).

See also Cecil vs. Clark 44 W. Va. 695, 30 S. E. 216, 219.

Coming now to consider the cases in which the constitutionality of the statute was questioned, it is found that the courts have been unanimous in sustaining the constitutionality of statutes similar to the one under review.

In Back River Neck Turnpike Co. vs. Homberg (Md.) 54 Atl. 82, a petition, under statute (section 242 of article 23 of Code of Public General Laws, as amended by Chapter 607 of Acts (1894), was filed alleging that the turnpike company had failed to maintain its road in proper repair. An inquisition was had, and from an order of court overruling a motion to quash and confirming the inquisition of the jury (same as Viewers under Virginia law), and directing that tolls be not charged until the road was put in repair, an appeal was taken.

The Court said (p. 83):

"The sole question in the case relates to the validity and constitutionality of the act of 1894 (chapter 607) amending section 242 of article 23 of the Code. The appellant contends that this act is unconstitutional and void, because it does not provide for any notice of the proceeding to the turnpike company, and it provides for **taking private property without due process of law** in

contravention of the state and federal constitutions. This act was recently before the court in the Turnpike Company vs. Startzman, 86 Md. 365, 38 Atl. 777, a case involving proceedings under the act; and, while the points here made were not directly presented in that case, we said the proceedings adoptd and pursued in that case could not be objected to on constitutional grounds. Now, **it is quite difficult to see how and in what manner the proceedings authorized by the act of 1894 (chapter 607) can involve the question of taking private property without due process of law, as urged by the appellant in this case.** The appellant company was incorporated under article 23 of the Code (section 233), which provides for the formation of corporations for making turnpike roads, and according to the express terms of its charter it was required to have at least 15 feet in width of the bed of its turnpike road covered with broken stone or gravel or other hard or durable materials to the depth of at least 12 inches, unless the natural bed be hard. The act of 1894 provides that it shall be the duty of the company which has been incorporated to keep and maintain its road in good order and repair, and of the proper width, as required by its charter; **and its failure so to do disentitles it to charge tolls for the use of its road by the public. The act does not provide for the taking of private property in any way, but simply adopts a method or mode for compelling the corporation to comply with its charter obligations and the law under which it derives its powers. Appropriate regulation of the use of property is not taking property within the meaning of the constitutional prohibition.** Railroad Co. v. Richmond, 96 U. S. 527, 24 L. Ed. 754; Baltimore Belt R. Co. v. Baltzell, 75 Md. 98, 23 Atl. 74." (Black print ours).

In Tennessee, the Turnpike Act (1835) provided that the County Court should appoint three commissioners whose duty it should be to see that turnpike roads were kept in repair and when, in the opinion of a majority of the Commissioners, the roads were in bad condition, they should have the right to open the

gates until the road was put in good order. Allen v. Smith (Tenn.), 47 S. W. 206, 207. In this case, the constitutionality of the statute is questioned.

The Court says (p. 208):

> "First, they say that the acts of 1835 and 1877, under which the commissioners claim to be authorized to open toll gates are unconstitutional, because under their provisions the commissioners are empowered to suspend the vested rights of complainants without '**due process of law**,' in that a judgment is rendered against them without any sort of trial, 'without witnesses, without jury, without any of the forms common to the courts of justice, and without the privilege of appearing by its agents or counsel.' The validity of the act of 1835 was questioned in the case of Turnpike Co. v. Marshall, supra. The opinion of Chancellor East was filed with the opinion of the supreme court, and is published in the report of the case. Chancellor East in his opinion attacked the validity of this act, but, finding other grounds upon which he could dispose of the case, the question was not directly determined. The act was again assailed in the case of B. F. King against Nashville & Duck River Turnpike Company. This came up from the circuit court of Davidson County. The statute in question was held unconstitutional by Justice McAlister, who was then sitting as judge of the circuit court, but upon appeal to the supreme court, in an oral opinion, this act was held to be valid. See Minutes December Term, 1891, p. —. This court is bound by the determination of this question by the supreme court of the state, and it is therefore useless to discuss the constitutionality of the statute in question.'

This case was affirmed by Supreme Court, February 26, 1898 (see note to Allen v. Smith, 47 S. W., 206, 210).

These cases are directly in point and sustain the constitutionality of the statute under review, nor is there any dissenting opinion, the court being unanimous in its opinion in each case.

The only cases in which the constitutionality of the statute has been questioned are the cases of Powell v. Sammons, 31 Ala., 552; Salt Creek Turnpike Co. v. Parks (Ohio), 35 N. E., 304, neither of which cases are in point.

In the Alabama case, a charter was granted to the Central Plank-Road Company by the legislature, January 30th, 1850, and **afterwards,** an act was passed at the session of the legislature of 1853–4, providing for the suspension of tolls when a turnpike road was found out of repair. The court held that the charter of the company was a contract and the legislature could not impair its obligation; that, therefore, the statute, being enacted after the granting of the charter, was unconstitutional **as far as concerned the Central Plank-Road Company,** and any other expression as to its constitutionality was necessarily **obiter dictum.** The court said (p. 560):

> "The legislative charter to the Central Plank-Road Company was accepted, and the company organized under it. It is a contract within the meaning of the constitution of the United States, the obligation of which the legislature had no power to impair. * * * Beyond all question, these sections of that act (i. e. the act of 1853–4), providing for suspension of tolls, **are, as to the Central Plank-Road Company,** unconstitutional and void." (Black print ours.)

The Virginia statute in question was enacted long before the plaintiff in error obtained its charter, having been enacted, as hitherto shown, in 1817 (2 R. C. 219, 23).

But, more than this, the Alabama statute (set out in the opinion) differs **very materially from the Virginia statute, in that the Alabama statute makes no provision for notice to the Turnpike Company nor does it give the company any right to be heard before the tolls are suspended.**

The Ohio case is easily distinguishable from the case at bar because the proceedings in that case were under the statute providing that any turnpike out of repair for six months, should

be deemed abandoned and should, therefore, become a free road, and the decision was based on the very facts that make the Ohio statute materially different from the Virginia statute, namely, on the fact that there was no provision for an appeal from the report of viewers (Virginia statute provides for such an appeal), and, secondly, on the fact that the Ohio statute provides **for the forfeiting of the right to take tolls, the forfeiting of its franchise, and the forfeiting of its roads.**

The proceedings in question here do not attempt to forfeit the right to take tolls, the franchise or the road, but simply prevents the taking of tolls when the company has not the right, to-wit, when the roads are out of repair.

It is not remarkable that there should be such a unanimity of the decisions in support of the constitutionality of the statute under review. For the intention of the statute should not be lost sight of. There is no attempt to take the roads or to cause turnpike companies to lose their property, but the purport of the statute is to compel turnpike companies to perform the duties they owe the public. Until the turnpike company fails to perform its duty the statute does not operate, and when the failure occurs, the statute operates only until the duty is fulfilled. One of the most important duties which a turnpike company owes to the public is to keep its roads "in good and perfect order and repair," and when the plaintiff in error began to operate its roads, it was put on notice, by the statute in question, that the state would compel it to perform its part of the contract, to-wit, keep its road in repair. The legislature, therefore, having provided machinery by which the plaintiff in error can be compelled to live up to its part of the contract or surrender its tolls until it is prepared to live up to it, there can be no question of the right to make use of such machinery. The plaintiff in error was granted the privilege of collecting tolls from those using the roads in consideration of its keeping them in good repair and order, and if it fails to do that, it has no right to exact tolls, and the legis-

lature has provided a speedy method by which it can be determined whether the turnpike company is in default. Williamsport, etc., Turnpike Company v. Startzman, 86 Md. 363, 38 Atl. 777, 778.

While it may be true that certain sections of the statute contemplate a final forfeiture of the roads, provided the **turnpike company has not made real and substantial effort to put the roads in repair** (latter part of section 9 of the Act), this question is not in any manner involved in this case and it is unnecessary to determine whether the plaintiff can be affected by those provisions. This proceeding is only to prevent the collection of tolls until the road is put in repair, and it is proper to invoke the remedy provided by the statute to accomplish that end (Williamsport, etc., Turnpike Company v. Startzman, 86 Md. 363, 38 Atl. 777, 779).

In other words, these proceedings are, as said in Back River Neck Turnpike Co. v. Hamberg, 96 Md. 430, 54 Atl. 82, a regulation of the use of property, and it has been finally established by this Honorable Court that the appropriate regulation of the use of property is not "taking" it, within the meaning of the constitutional prohibition. Railroad Company v. Richmond, 96 U. S. 521; Covington, etc., Turnpike Company v. Sandford, 164 U. S. 578, 597. In this last case, Mr. Justice Harlan, in delivering the opinion of the Court, said (p. 594):

> "Turnpike roads established by a corporation, under authority of law, are public highways, and the right to exact tolls from those using them comes from the State creating the corporation. California v. Central Pacific Railroad, 127 U. S. 1, 40. And the exercise of that right may be controlled by legislative authority to the same extent that similar rights, connected with the construction and management of railroads by corporations, may be controlled."

The question decided in this case as to the regulation of the rate of tolls will be considered later herein.

In assigning errors to the Supreme Court of Appeals of Virginia, the plaintiff in error admitted that a State may impose fair and reasonable regulations on public service corporations, but contends that such regulations must not be arbitrary, unreasonable or of such a nature that the corporation cannot comply therewith. (Record p. 12).

There is no arbitrary or unreasonable regulations in the statute in question, nor is the regulation of such a nature that the corporation cannot comply therewith.

The proposition that a turnpike company must keep its road in repair is too well established to need further citation of authorities. It surely cannot be contended that to compel the performance of that duty is arbitrary or unreasonable. The question of the ability to put the roads in repair will be treated in discussing the third assignment of error in this Honorable Court.

There could be no less arbitrary, more reasonable regulation than one which provides that, where a turnpike company fails to perform a service upon the performance of which the right to collect tolls depends, then, in such event, the exaction of tolls shall cease until that service is performed; but, so soon as the service is performed, the right to collect tolls shall immediately begin again. This is what the statute in question provides, and it is all that the statute provides. There could be no lighter punishment inflicted on the turnpike company for failure to perform its duty, for though their intake ceases, there is no output.

But the contention is made that, by the suspension of tolls, the public will use the roads without compensation to the owner thereof, in violation of Article XIV, of the Constitution of the United States.

In the first place, it must be remembered that a turnpike is a public highway like any other public road, except it is maintained by the tolls exacted, while an ordinary road is maintained by taxes (State v. Hannibal, etc., Gravel Road Co., 138 Mo. 332, 39 S. W. 910); and, though a chartered turnpike is the private

property of the company, it is also a public thoroughfare on which any person may lawfully travel, whether he be required by the terms of the charter to pay tolls or not. (Ware v. Clark, etc., Turnpike Co. 3 Ky. Law Rep. 325).

In Montgomery County v. Clarksville, etc., Turnpike Co. (Tenn.) 109 S. W. 1152, it is said (p. 1153):

> "The only difference between a turnpike and a common highway is that, instead of being made at the public expense in the first instance, it is authorized and laid out by public authority and made at the expense of individuals, and the cost of construction and maintenance is reimbursed by a toll levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as any other highway;" quoting from Com. v. Wilkinson, 16 Pick (Mass.) 175.

This proposition of law is so firmly established, that a further citation of authorities on the subject would be superfluous.

The use of a turnpike by the public is an absolute necessity, for the traveler has no option but to use it, and the principle of law that to take property for public use without compensation is in violation of Article XIV, of the Constitution of the United States, does not, therefore, apply to proceedings like the one in question suspending tolls because of the failure of the turnpike company to perform its duty, and, incidentally, making it possible for the public, during such suspension, to travel over the road without making compensation therefor.

It is true, as claimed in the assignments of error, that this Honorable Court has declared repeatedly that the right of a public service corporation to reasonable remuneration for the use by the public of its property is itself a property right of such a nature

that it is protected under the "due process of law" clause of Section 1 of Article XIV, of the Constitution of the United States, but, it was never intended to extend this principle of law to include such cases as the one under review.

The cases enunciating this principle of law only involved whether a general scheme of maximum rates imposed by State authority prevented railroads from earning a reasonable compensation, and, if not, whether the enforcement of such a scheme of rates would be unjust, and, therefore, be a taking of property without due process of law in violation of the Constitution of the United States. Atlantic Coast Line v. North Carolina Corp. Com'n 206 U. S. 1, 24. As noted in this case, Mr. Justice Harlan summed up the principle upon which these cases proceed in delivering the opinion of the Court in Smyth v. Ames, 169 U. S. 466, 526.

> "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States.
>
> "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In Atlantic Coast Line v. North Carolina Corp. Com'n 206 U. S. 1, after quoting as above from Smyth v. Ames, 169 U. S.

466, Mr. Justice White, in delivering the opinion of the Court, proceeded with the following language (p. 24):

> "But this case does not involve the enforcement by a State of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in St. Louis, &c. Ry. Co. v. Gill, 156 U. S. 649, and Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 257."

This language so thoroughly distinguishes the present case from the case of Smyth v. Ames, 169 U. S. 466, and those cases similar thereto, that, it is only necessary to add that the proceedings under review is simply the exercise of a state authority to compel a turnpike company to perform a specific duty. These proceedings do not directly involve any question whatever of the power to fix rates, and the constitutional limitations controlling the exercise of that power, but are concerned solely with the performance by a turnpike company of a service which it is a part of its general duty to perform for the public convenience. Atlantic Coast Line v. N. Car. Corp. Com'n 206 U. S. 1, 26.

Moreover, the railroad cases are easily distinguishable from the case at bar, because railroads cannot be operated without incurring expense, while there can be no expense of operation of a turnpike while its tolls are suspended.

The question as to what is "due process of law," has so often been before this Honorable Court, that it is only necessary to refer to Dent v. West Virginia, 129 U. S. 114, 123; Williams v. Newman, 93 Va. 719, 724, and state that the statute at bar provides for "**reasonable notice**" to the turnpike company, a "**reasonable opportunity to be heard**" before an "**impartial tribunal which has jurisdiction**" under the "**accustomed mode of procedure,**" recognized in Virginia since 1817, and that the **right of appeal from the report of viewers is reserved to the turnpike company, and that, until this appeal is determined, the traveler must continue to pay toll.**

The contention was made in the Supreme Court of Appeals of Virginia that the judgment or order complained of is not in the exercise of the police duty of the State as it is not an order protecting the morals, safety or health of the citizens of Princess Anne County. (Record p. 12). Issue is taken on this point, for it is submitted that the order very materially affects the **safety** of all travelers over the turnpikes in question, and is in the exercise of the police power of the State. Without further argument on this subject, reference is made to the case of Davis v. Vernon Shell-Road Company (Ga.) 29 S. E. 475, 476, holding that such a provision is purely a police regulation in its character.

THE THIRD ASSIGNMENT OF ERROR ALONE REMAINS TO BE CONSIDERED.

In this assignment, the plaintiff in error states that the statute under review fixed and limited the tolls that could be charged the public for passage over its roads and that the turnpike company had conformed to this statute and that being thus limited, they derived no income from the turnpike companies; that the whole income, except certain interest charges, had been expended in the maintenance and operation of the road and that the roads had been kept in as good repair as possible with the income which the statute had limited by fixing the toll charges thereon, and that, therefore, any judgment rendered without taking such matters into consideration, would violate Section 1 of Article XIV, of the Constitution of the United States (Record pp. 4, 5, 11, 12, 13, 26, 27, 28, 35), and invoked the principles laid down by this Honorable Court in what are familiarly known as the "rate cases" to sustain the contention and refers to the following cases:

Atlantic Coast Line v. N. Car. Corp. Com'n 206 U. S.; Railroad Commission Cases 116 U. S. 307, 331; Minneapolis, etc., Railroad Company v. Minnesota, 186 U. S. 157; Chicago, etc., Co. v. Minnesota, 134 U. S. 418; Reagan v. Farmers Loan and Trust Co. 154 U. S. 362; Covington, etc., Turnpike Co. v. Sandford 164 U. S. 518.

These cases have been heretofore referred to in this brief and uniformly hold that a state law is unconstitutional which fixes such a rate of toll to be charged by public service corporations as to prevent a fair return to the Corporation on the property regu-

lated, and this is undoubtedly an established law, **but instead of these cases sustaining the position of the plaintiff in error, they rather sustain the constitutionality of the proceedings in question.** For these cases firmly establish the proposition that if the rate of toll established by the legislature prevents the turnpike company from performing its duty, to-wit, the keeping in repair of its roads, and prevents the yielding to the turnpike company of a fair return on its property, then the rate of toll is unconstitutional and the remedy of the turnpike company is to **attack the rate and not the provisions of the statute compelling it to perform its duty.**

If the contention of the turnpike company is sound, then a railroad can submit to any rate of toll charges fixed by a state and use the same as an excuse for failure to keep its road bed or its rolling stock in repair and as an excuse for failure to afford to the public the service which it owes to the public. It would seem, therefore, that this Honorable Court has prevented any such excuse being advanced by public service corporations for failure to perform the duty which they owe to the public by establishing the principles that such a rate is unconstitutional, and in the case of Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 594, this Honorable Court held that "a statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from **keeping its road in proper repair,** and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls from passengers and freight." (Black type ours.)

This decision robs the contention of the plaintiff in error of any force it might otherwise have; for it announces to the turnpike company, that if, **after securing its franchise,** the Legislature attempts to make such a reduction in its toll rate as to prevent it

from keeping its roads in repair, such reduction is obnoxious to the Constitution of the United States.

It is, therefore, very clear, in accordance with the principle laid down in Turnpike Co. v. State, 3 Wall. 210, 214 (hitherto quoted from in this brief), that the fact that the legislature has fixed a rate of toll which it can charge, furnishes no excuse for the turnpike company to disregard the burden which is placed upon it, to-wit, the keeping of its roads in repair, while at the same time, insisting upon the observance of the benefit, to-wit, the collection of tol's.

The turnpike company has a remedy and has a right to enforce that remedy, to-wit, by attacking the rate of tolls, but it cannot invoke its waiver of affording itself of the remedy as an excuse for a failure to perform its c'ear duty.

Moreover, as said by Mr. Justice Harlan, in Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 597, if a turnpike company cannot maintain a highway and earn dividends for stockholders, it is a misfortune for it and them, which the constitution does not require to be remedied by imposing unjust burdens upon the public.

Can there be any more unjust burden imposed upon the people of Princess Anne County than to allow the turnpike company, which has a remedy, to present an unconstitutional regulation of the state, to-wit, the toll rate (if the statement of the turnpike company is true), as an excuse for imposing upon these people by allowing its roads to become worn out and practically impassable?

Moreover, it is proper to point out, that the rates complained of by the public service corporations in the cases last above cited, were rates fixed after the corporations had secured their franchise to do business, and after they began to operate, and, therefore, the rates imposed were an additional burden upon them; while, in this case, the statute in existence at the time the charter was applied for, and above copied, fixed the rate of toll and the proceedings to

compel a performance of duty, and constituted a part of the contract then entered into between the turnpike company and the Commonwealth, and neither these rates, nor the proceedings have been changed since the charter was granted, and, therefore, the burdens were placed on the plaintiff in error at the time it secured its franchise and was a part and parcel of that franchise. The State had the absolute right, in granting franchises to this and similar corporations, to place such burdens and conditions on the corporation as it deemed proper for the public welfare, and the corporation has a remedy in refusing to accept the franchise, and the corporation, in accepting its franchise, voluntarily assumed the burdens which it is now seeking to relieve itself of.

In this third assignment of error, the question of reasonable regulations was also discussed, but this subject has already been considered in this brief.

It is, therefore, submitted that, in the case at bar, though the motion to dismiss the writ of error be overruled, yet the judgment or order of the Circuit Court of Princess Anne County being, as said by the Supreme Court of Appeals of Virginia "plainly right," the motion to affirm must prevail.

Respectfully submitted,

SAM'L W. WILLIAMS,
Attorney General of Virginia.

J. D. HANK,
For Defendant in Error.

NORFOLK & SUBURBAN TURNPIKE COMPANY *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 962. Submitted April 8, 1912.—Decided June 10, 1912.

Although a State may not be named as a party in the original proceeding, if it was really begun and prosecuted on its behalf and the State is named in all the papers on appeal and the State's attorney appears in this court generally, even if inadvertently, a motion to dismiss on the ground that the State is not a party will not prevail.

Where the highest court of the State refuses a writ of error because, in its opinion, the judgment below is plainly right, doubt exists as to whether it is a refusal to take jurisdiction or an exercise of jurisdiction and affirmance; under the circumstances of this case, however, the Chief Justice of the state court having allowed the writ of error for review by this court, *held* that the judgment was on the merits and the writ of error runs to the highest court. *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364, distinguished.

Where the refusal of the highest court of the State to allow a writ of error is also a refusal to take jurisdiction the writ of error from this court runs to the lower court.

Hereafter this court will regard the refusal of the highest court of the State to allow a writ of error to review the judgment of a lower court as a refusal to take jurisdiction and not as an affirmance unless the contrary plainly appears on the face of the record.

A State does not take property of a turnpike company by opening the gates when its road is out of repair; nor is the enforcement of a statute which makes the keeping of a toll road in repair a condition precedent to the right to collect tolls an unconstitutional taking of property without due process of law; and in this case so *held* as to the enforcement of such a statute which has been in force in the State of Virginia since 1817.

THE facts, which involve the jurisdiction of this court under § 709, Rev. Stat., and the power of a State under the Fourteenth Amendment to suspend tolls on a turnpike pending the making of repairs properly ordered by state authority, are stated in the opinion.

Mr. Samuel W. Williams, Attorney General of the Commonwealth of Virginia, with whom *Mr. J. D. Hank* was on the brief, for defendant in error, in support of the motion.

Mr. Nathaniel T. Green, for plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On April 24, 1911, as authorized by the laws of Virginia, the judge of the Circuit Court of Princess Anne County, Virginia, of his own motion, appointed three persons, styled viewers, to examine and report upon the condition of three turnpikes, situated in the county and owned by the plaintiff in error. The viewers reported the turnpikes to be in bad condition and made recommendations as to the work necessary to be done to put them in good order. The Turnpike Company appealed from the report of the viewers to the Circuit Court. On the hearing of the appeal various motions were made on behalf of the Turnpike Company, to the overruling of which exception was taken, and which will be hereafter referred to, and an order was

entered as authorized by a statute suspending the taking of tolls on the turnpike until they were put in proper repair. The effect of the order, however, was suspended by the making of an application to the Supreme Court of Appeals of Virginia for the allowance of an appeal and a writ of error to the order of the Circuit Court. The application however was rejected by an order reading as follows:

"In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Thursday, the 11th Day of January, 1912.

"The petition of the Norfolk & Suburban Turnpike Company, a corporation, for a writ of error and supersedeas to a judgment or order entered by the Circuit Court of Princess Anne County, on the 12th day of December, 1911, in certain proceedings, pending in said court, whereby the collection of tolls by the said petitioner on certain sections of a turnpike located in said county was suspended, having been maturely considered and the transcript of the record of the judgment or order aforesaid seen and inspected, the court being of opinion that the said judgment or order is plainly right, doth reject said petition."

A writ of error addressed to the Supreme Court of Appeals of Virginia was then allowed by the President of that court. It was therein recited that the Supreme Court of Appeals of Virginia had "refused a writ of error, thereby affirming said judgment of said Circuit Court of Princess Anne County, Virginia." The same judicial officer also approved the bond and signed the citation. The Commonwealth of Virginia, however, was named as the obligee in the bond, and the citation was directed to that State as the "defendant in error." The Attorney General of the State, who states in his brief that he inadvertently signed as "Commonwealth's attorney of Princess Anne County," acknowledged service of the citation and entered the appearance of the Commonwealth in this court "without ad-

mitting that the Commonwealth of Virginia is a proper party and reserving all rights."

Appearing for the defendant in error, the Attorney General of Virginia moves to dismiss the writ of error, "because this court has no jurisdiction," or to affirm the order and judgment below "because the questions on which jurisdiction depend are so frivolous as not to need further argument."

The motion to dismiss is based upon the contention that the appearance in this court is a qualified one and "that the appeal was improvidently awarded in this case, that the Commonwealth of Virginia has nowhere in the proceedings been made a party, and is not now a proper party in this case." But although the Commonwealth of Virginia was not named as a party to the proceedings initiated by the judge of the Circuit Court, it is not claimed that those proceedings were not in reality begun and prosecuted on behalf of the Commonwealth, which in effect must have been the conclusion of the President of the Supreme Court of Appeals of Virginia when he approved the bond and allowed the citation, as shown by the recitals in those papers to which we have heretofore referred. The grounds of the motion are therefore without merit. *Pearson* v. *Yewdall*, 95 U. S. 294.

But aside from the propositions on which the motion to dismiss rests and which we have disposed of, there is an additional ground to which on our own motion we deem it necessary to refer, that is, the existence of a possible doubt as to our jurisdiction begotten by the form in which the court expressed the action taken by it concerning the proceedings to review the order or judgment of the trial court. Thus although the Supreme Court of Appeals of Virginia denied a writ of error to the Circuit Court because it was of opinion that the order of the lower court was "plainly right," it does not affirmatively appear whether, by this action, the court was merely declining

to take jurisdiction of the case or in effect was asserting jurisdiction and disposing of the case upon the merits by giving the sanction of an affirmance of the judgment of the trial court. This writ of error runs to the Supreme Court of Appeals and not to the trial court. In view of the ambiguity it is unquestioned that the writ of error would have to be dismissed if we applied the ruling in the *Western Union Telegraph Company* v. *Crovo*, 220 U. S. 364, 366. It will be seen, however, that the court below in acting upon the application presented to it to review the judgment of the trial court conformed to what was held to be an exercise of jurisdiction by affirmance in *Gregory* v. *McVeigh*, 23 Wall. 294. It is clear, therefore, that we cannot apply the rule announced in the *Crovo Case* and the one previously declared in the *Gregory Case*, because the two could not be consistently made here applicable. The difference between the cases, however, is not one of principle, but solely depends upon the significance to be attributed to the particular form in which the action of the court below is manifested. In other words, the apparent want of harmony between the rulings of this court has undoubtedly arisen from the varying forms in which state courts have expressed their action in refusing to entertain an appeal from or to allow a writ of error to a lower court and the ever-present desire of this court to so shape its action as to give effect to the decisions of the courts of last resort of the several States on a subject peculiarly within their final cognizance. A like want of harmony resulted from similar conditions involved in determining what was a final judgment of a state court susceptible of being reviewed here, and the confusion which arose ultimately led to the ruling that the face of the judgment would be the criterion resorted to as the only available means of obviating the great risk of confusion which would inevitably arise from departing from the face of the record and deducing the principle of finality

by a consideration of questions beyond the face of the alleged judgment or decree which was sought to be reviewed. The wisdom of that rule as applied to a question like the one before us is, we think, apparent by the statement which we have made concerning the rule in the *Crovo Case* and the previous decisions. Despite the ambiguity involved in the form in which the court below expressed its action, we do not think that ambiguity should be solved against the existence of jurisdiction, because, in our opinion, there is little or no room for doubt that when the form of expression used by the court below is read in the light of the previous rulings it becomes quite clear that the court deemed that it was exercising jurisdiction over the cause and virtually affirming the judgment and was expressing its action in such a way as to clearly indicate that such was its intention. This is fortified by the fact that the writ of error was allowed by the presiding judge of the court. While, therefore, in this case, for the reasons stated, we entertain jurisdiction and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo Case*, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action.

Upon the merits, we are of opinion that the alleged Federal questions are so plainly wanting in merit as not to justify the retention of the cause for oral argument. The supposed Federal questions are embodied in three motions made in the Circuit Court. By motion No. 1 the Circuit Court was asked to dismiss the proceedings because, as the statute, in the event the report of the viewers was confirmed, authorized the public until the turnpikes were put in repair to use the same for the purpose of travel and passage without payment of toll or other compensation, a taking of the property of the plaintiff in error for public use without just compensation was authorized, in violation of the due process clause of the Fourteenth Amendment. Motion No. 2 embodied a request that the court should not enter judgment affirming the report of the viewers because, for the same reasons specified in the first motion, the judgment would operate to deprive the plaintiff in error of its property without due process of law, in violation of the Fourteenth Amendment. By motion No. 3 it was in effect claimed that the turnpikes in question were not profitable, that plaintiff went into possession of the roads in July, 1908, and had operated the same continuously; that no complaint had theretofore been made as to the condition of the roads; that the statute under which the proceeding was prosecuted fixed the tolls to be charged, and that substantially all the revenue derived from the tolls had been judiciously employed in keeping the roads in repair, and that they had been kept "in as good repair as possible with the revenue received therefrom." It was alleged that to enter a judgment suspending the collection of tolls under such circumstances would violate the due process clause of the Fourteenth Amendment. The refusal of the court to hear evidence to substantiate the claim made in this motion and the overruling of the motion were duly excepted to. It nowhere appears in the record that there was even a suggestion that the

statute in question invaded contract rights as to the tolls to be charged, nor was it claimed that since the acquisition by plaintiff in error of his rights therein the legislature of Virginia in regulating the turnpikes had altered the tolls. On the contrary in the brief of counsel for the Commonwealth the statement is made that "this statute has been a law of Virginia, with little change, since February 7, 1817," and there has been no denial of this statement. The motions below did not, therefore, amount to a claim against the rates *per se*, but simply asserted that as the travel on the turnpikes was not sufficient to cause their operation to be profitable, that is to say, to produce a sufficient revenue to enable the roads to be kept in good order, therefore the obligation imposed by the statute and voluntarily assumed ought not to be enforced. The mere statement of this proposition is sufficient to establish its entire want of merit. To suspend the taking of tolls while the roads were out of repair manifestly was not a taking of property, but was simply a method provided by statute to enforce the discharge of the public duty respecting the safe and convenient maintenance of a public highway. In other words, as observed by the Attorney General for the Commonwealth, the burden of keeping the turnpikes in repair was made a condition precedent to the right to collect tolls.

Affirmed.